TRADE SANCTIONS AND PUBLIC POLICY IN INTERNATIONAL ARBITRATION

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Tiivistelmä/Referat – Abstract

Kauppapakotteet ovat valtioiden välisessä toiminnassa yleisesti hyödynnetty voimankäytön muoto. Kauppapakotteilla kuten kohdennetuilla tuonti- ja vientikielloilla pyritään saavuttamaan valtioiden lähtökohtaisesti julkisoikeudellisia tavoitteita ja asettamaan painetta toisia valtioita kohtaan. Niillä on kuitenkin myös välittömiä vaikutuksia yksityisten välisissä oikeussuhteissa, koska ne tavanomaisesti pyrkivät estämään yksityisten toimijoiden välisen kaupankäynnin ja liiketoiminnan. Suuri osa liikeelämän sopimuksista sisältää välityslausekkeen, jonka myötä sopimuksesta seuraavat riidat tulee ratkaista välimiesmenettelyssä. Täten myös välimies voi joutua ottamaan kantaa pakotteiden vaikutukseen osapuolten välisessä sopimussuhteessa. Tässä tutkielmassa kysytään, kuinka pakotteet vaikuttavat välimiesmenettelyn lainvalintaan *ordre public* -säännöksinä ja toisaalta sitä, kuinka suomalainen tuomioistuin voi huomioida pakotteet välitystuomion mahdollisen mitättömyyskanteen tai ulkomaisen välitystuomion täytäntöönpanon yhteydessä.

Yksi kansainvälisen välimiesmenettelyn perusperiaatteista on se, että osapuolilla tulee olla mahdollisuus sopia heidän välisessä suhteessa sovellettavasta menettelystä mukaan lukien siihen soveltuvista oikeussäännöistä. Lähtökohtaisesti välimiehen tulisi siis soveltaa osapuolten valitsemaa lakia eikä huomioida sen ulkopuolista sääntelyä kuten ulkomaisia kauppapakotteita. Osapuolten tahdonautonomian periaatteen orjallinen noudattaminen voisi johtaa kuitenkin kohtuuttomiin lopputuloksiin, joten kirjallisuudessa ja välimieskäytännössä on syntynyt useita erilaisia metodeita tiettyjen ulkomaisten pakottavien sääntöjen huomioimiseen. Erityisesti YK:n asettamat monenkeskiset pakotteet voivat tulla sovellettaviksi siten, että välimies turvautuu kansainvälisesti laajalti jaettuihin keskeisiin oikeudenmukaisuuden periaatteisiin (*transnational public policy*). Mahdollista on myös huomioida ulkomaiset pakotteet esimerkiksi soveltuvan lain *force majeure* –käsitteen kautta, jolloin ulkomaisia pakotteita ei tarvitse välttämättä suoranaisesti soveltaa kolmannen valtion lakina, vaan ne voivat ainoastaan vaikuttaa muutoin soveltuvan lain tulkinnassa. Useimmissa tapauksissa tämä onkin toivottavin ratkaisu. Toisaalta eräissä tapauksissa ulkomaisten pakotteiden on katsottu olevan myös niin sanottuja kolmannen valtion pakottavia säännöksiä, jotka tulevat sovellettavaksi vain tiettyjen ehtojen täyttyessä.

Välimiehen antama välitystuomio on lähtökohtaisesti pysyvä, eikä kansallisilla tuomioistuimilla ole oikeutta puuttua sen aineelliseen sisältöön. Mikäli välitystuomio on kuitenkin tuon tuomioistuinvaltion oikeusjärjestyksen perusteiden vastainen (nk. *ordre public* tai *public policy* -poikkeus), voidaan se tuomioistuinmenettelyssä mitätöidä. Samoin tuomioistuin voi kieltäytyä tunnustamasta ja panemasta täytäntöön sellaista ulkomaista välitystuomiota, joka on sen maan oikeusjärjestyksen perusteiden vastainen. Kauppapakotteet saattavat tällä tavoin tietyissä tilanteissa aiheuttaa välitystuomion mitättömyyden tai tehdä välitystuomion täytäntöönpanon mahdottomaksi. Jos välitystuomiossa ei ole huomioitu sellaista kauppapakotetta, jonka Suomi on osana EU:n yhteistä ulko- ja turvallisuuspolitiikkaa hyväksynyt, ja pakotteen huomiotta jättäminen johtaisi Suomen oikeusjärjestyksen perusteiden vastaiseen lopputulemaan, tulee kansallisen tuomioistuimen puuttua välitystuomion pysyvyyteen. Sellaiset pakotteet, jotka eivät ole osa Suomen oikeusjärjestystä eli käytännössä ulkomaiseen lakiin perustuvat pakotteet eivät voi lähtökohtaisesti aiheuttaa tällä tavoin välitystuomion mitättömyyttä tai sen tunnustamisen ja täytäntöönpanon epäämistä.

Avainsanat – Nyckelord – Keywords
arbitration; choice-of-law; trade sanctions; sanctions; enforcement; foreign arbitration award; ordre public; välimiesmenettely; lainvalinta; kauppapakotteet; pakotteet; täytäntöönpano; ulkomainen välitystuomio.

Säilytyspaikka – Förvaringställe – Where deposited

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Final Award of the Arbitration Court of the German Coffee Association, 19 March 1987, Yearbook of Commercial Arbitration XVIII, 1994, pp. 44–47.

SCC Award V0007/2008, Award of 19 October 2010**,** published at http://www.jpinfonet.se/Swedish-Arbitration-Portal/ in connection with Svea Hovrätt ruling T 611-11 (Accessed 20 August 2015).

Amsterdam Grain Trade Association, Award of 11 January 1982, Yearbook Commercial Arbitration VIII (1983), pp. 158–161.

Institutional rules:

FAI Rules	Arbitration Rules of the Finland Chamber of Commerce, current rules in force as of 1 June 2013.
ICC Rules	Rules of Arbitration of the international Chamber of Commerce, current rules in force as from 1 January 2012.
1998 ICC Rules	Rules of Arbitration of the international Chamber of Commerce in force as from 1 January 1998 until 31 December 2011.
1988 ICC Rules	Rules of Arbitration of the international Chamber of Commerce in force as from 1 January 1988 until 31 December 1997.
LCIA Rules	London Court of International Arbitration, Arbitration Rules, current rules in force as from 1 October 2014.
SCC Rules	Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (current rules in force as of 1 January 2010).

United Nations Security Council:

UNSC Resolution S/RES/820, adopted 17 April 1993.

UNSC Resolution S/RES/864, adopted 15 September 1993.

UNSC Resolution S/RES/1011, adopted 16 August 1995.

UNSC Resolutions S/RES/1696, adopted 31 July 2006.

UNSC Resolutions S/RES/1737, adopted 23 December 2006.

UNSC Resolutions S/RES/1737, adopted 24 March 2007.

UNSC Resolutions S/RES/1803, adopted 3 March 2008.

UNSC Resolutions S/RES/1835, adopted 227 September 2008.

UNSC Resolutions S/RES/1929, adopted 9 June 2010.

UNSC Resolutions S/RES/1984, adopted 9 June 2011.

UNSC Resolutions S/RES/2049, adopted 7 June 2012.

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United Nations General Assembly:

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ICC Force Majeure Clause 2003	ICC Force Majeure Clause 2003, International Chamber of Commerce, ICC Publication No. 650, ICC Publishing S.A., 2003.
ILA Report and Recommendations on Ascertaining the Contents of the Applicable Law in International Arbitration 1991	International Law Association International Commercial Arbitration Committee Report and Recommendations on Ascertaining the Contents of the Applicable Law in International Arbitration.

ILA Interim Report 2000	International Law Association London Conference 2000, Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards.
ILA Final Report 2002	International Law Association New Delhi Conference 2002, Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards.
ILA Recommendations 2002	International Law Association Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards, Resolution 2/2002.
New York Convention Guide	UNCITRAL Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), A /CN.9/814. Available at http://www.newyorkconvention1958.org/ Accessed 20 August 2015.
UNCITRAL Model Law Explanatory Note	Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006.
Valtionvarainministeriö 2015	Valtionvarainministeriön raportti (Report by the Ministry of Finance): *Venäjän talouden näkymät ja vaikutukset Suomeen.* Available at http://vm.fi/documents/10623/1096506/Ven%C3%A4j%C3%A4n+talouden+n%C3%A4kym%C3%A4t+ja+vaikutukset+Suomeen/82a661d4-1a31-4b4b-b71b-313bb7a25286. Accessed 20 August 2015.

List of abbreviations

Blocking Statute Act	The Act ameding the Council Regulation (EC) N:o 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (*Laki tietyn kolmannen maan lainsäädännön soveltamisen ekstraterritoriaalisilta vaikutuksilta sekä siihen perustuvilta tai siitä aiheutuvilta toimilta suojautumisesta annettua neuvoston asetusta (EY) N:o 2271/96 täydentävistä säännöksistä,* 265/1998)
Brussels I Regulation	Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)
CISG	United Nations Convention on Contracts for the International Sale of Goods, adopted on 11 April 1980 in Vienna
CJEU	Court of Justice of the European Union
Clunet	Journal du Droit International
Council	Council of the European Union
EU	European Union
FAA	Finnish Arbitration Act (*Laki välimiesmenettelystä,* 967/1992)
GATT	General Agreement on Tariffs and Trade
ICC	International Chamber of Commerce
ILA	International Law Association
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in New York on 10 June 1958
Rome I Regulation	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)
Rome Convention	Convention 80/934/ECC on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980
SAA	Swedish Arbitration Act (*Lag om skiljeförfarande,* 1999:116)
Sanctions Act	Act on the Fulfilment of Certain Obligations of Finland as a Member of the UN and the EU (*Laki eräiden Suomelle Yhdistyneiden Kansakuntien ja Euroopan unionin jäsenenä kuuluvien velvoitusten täyttämisestä,* 1967/659)

SCC	Stockholm Chamber of Commerce
SPILA	Swiss Private International Law Act (*Loi fédérale sur le droit international privé*, RS 291)
TEU	Consolidated version of the Treaty on European Union (2012/C 326/01)
TFEU	Consolidated version of the Treaty on the Functioning of the European Union (2012/C 326/01)
UN	United Nations
UNSC	United Nations Security Council
UNC	United Nations Charter
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNCITRAL	United Nations Commission on International Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts of 2010
US	United States
WTO	World Trade Organization

1 Introduction

1.1 Introductory remarks

1.1.1 Introduction to trade sanctions

Trade sanctions, such as export and import restrictions aimed against the sanctioned state, have experienced a surge in popularity in recent years. They are regularly used to impose political and economic pressure, and to punish undesirable behavior by other states. Since the fall of the Berlin wall in 1989, the United Nations ("UN") has taken an active role in imposing non-military sanctions regimes against governments or individuals that have presented a threat to peace and international security. These measures have included *i.a.* the sanctions against Yugoslavia in 1992[1], arms and petrol embargoes against Angolan rebels in 1993[2] and Rwanda in 1995,[3] as well as the sanctions regime against Iran set in 2007–2012, including arms embargo and limitations to trade of nuclear technologies[4]. Besides UN-mandated sanctions, a number of countries have imposed their unilateral, autonomous trade sanctions outside the auspices of the UN to further their own political or economic goals or to take more extensive measures than required against countries sanctioned by the UN.

The Ukrainian crisis and the following freeze in Russo-Western relations from 2014 onwards have launched new rounds of notable economic sanctions and countersanctions that have already affected the trade between the western world and Russia.[5] The first disputes seem to be raising their heads.[6] Unlike previous sanctions regimes, typically designated against minor rogue states or at most regional actors, the sanctions against Russia are imposed by a

[1] UNSC Resolution S/RES/820.
[2] UNSC Resolution S/RES/864.
[3] UNSC Resolution S/RES/1011.
[4] UNSC Resolutions S/RES/1696, S/RES/1737, S/RES/1747, S/RES/1803, S/RES/1835, S/RES/1929, S/RES/1984 and S/RES/2049. The sanctions against Iran are about to be lifted given that Iran complies with the limitations on nuclear activities. See Financial Times, 14 July 2015 and the related UNSC Resolution S/RES/2231.
[5] See *i.a.* Valtionvarainministeriö 2015, p. 15, stating that the exports of foodstuffs from Finland to Russia subtracted from EUR 103.3 million in 2013 to EUR 28.5 million in 2014, after the Russian Federation had imposed import restrictions on foreign foodstuffs. The EU has also prohibited the import of all goods originating from the Crimea or Sevastopol. See Council Regulation (EU) No 692/2014 of 23 June 2014.
[6] See *i.a.* the arising, yet later settled dispute on the delivery of French Mistral class warships to Russia, The Economist, May 15th 2015.

number of European states, including Finland, and target a major trading partner of Finland. The current situation has raised the legal questions surrounding trade sanctions on the agenda in Finland.

Although all trade sanctions are mainly geared towards changing the behavior of the target state and its administration, trade sanctions also necessarily have an impact on the contractual relations between private individuals involved in international trade with or within the target state. The imposed trade sanctions may render the contractual performance of one or more contracting parties impossible and thus give rise to contractual disputes. Today, the majority of players in international trade opt to resolve their disputes outside of national courts in international arbitration tribunals, which claim to offer an impartial, independent, proficient, confidential, and expeditious manner to settle these disagreements. For these reasons, trade sanctions related disputes are also often subjected to international arbitration.

1.1.2 International arbitration, party autonomy and public policies

International arbitration is essentially a consensual mode of dispute resolution and based on an agreement to arbitrate. An arbitrator is not a state judiciary, does not have a forum or *lex fori* and is therefore not bound by the mandatory provisions of national material law of the place of arbitration.[7] The law of the place of arbitration, the *lex arbitri*, may however have some effect on the parties' contract and the procedure between them, either during the arbitral proceedings or during possible setting aside proceedings.

The parties are as a general rule free to rule agree on virtually all aspects of their arbitral procedure, including the place of arbitration and the applicable legal rules to their contract and the possible disputes arising out of it (*lex causae*). The principle of party autonomy, the freedom of the parties to arrange their mutual rights and obligations between themselves is said to be the leading principle in international arbitration.[8] Certain exceptions to this general principle of party autonomy may nonetheless apply. Sometimes national legislators hold that

[7] Regarding state judiciaries' obligation to follow the rules of the *forum*, see *i.a.* Article 9(2) Rome I Regulation and Article 7(2) Rome Convention.
[8] Generally on the significance of party-autonomy in international arbitration, see *i.a.* Lew 1978, pp. 86–102 and Redfern *et al.* 2009, pp. 195–198.

certain categories of disputes, such as those relating to family law or criminal law, should be heard before national courts rather than arbitral tribunals, hence denying the arbitrability of these disputes.[9] Other times arbitrability is granted but the arbitrators are expected to consider certain mandatory principles or rules of law, *public policies*, which ought to be respected, even if the parties had agreed otherwise or even chosen a law that would not contain such restrictions. If these mandatory rules are not respected, the arbitrator will risk having the award set aside or refused recognition.[10] An arbitrator may in these cases be faced with *a conflict between the will of the State having promulgated the mandatory rule of law, on the one hand, and, on the other hand, the will of the parties*[11].

The exact definition and scope of public policy is not easily defined. The public policy exception has been said to be notoriously difficult to define,[12] and been described as a black hole in the system of arbitral jurisdiction because of the fact that it may be invoked by the parties in the most imaginative contexts.[13] The fact that in the case of international arbitration, public policy argumentation is applied virtually only in an international context yet ultimately based on municipal law, complicates the matter even further. Nonetheless, a definition by D. M. Lew offers a solid starting point for examining the matters of public policy:

> *"... [Public policy] reflects the fundamental economic, legal, moral, political, religious and social standards of every State or extra-national community. Naturally public policy differs according to the character and structure of the State or community to which it appertains, and covers those principles and standards which are so sacrosanct as to require their maintenance at all costs and without exception."*[14]

It should be noted already at this stage that trade sanctions claiming extraterritorial application, issued by a state or an extra-national community such as the UN, embodied in a

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[9] See *i.a.* Section 2 FAA, limiting the arbitrability of disputes under Finnish law to civil or commercial matters which can be settled by agreement.
[10] See chapter 3 below.
[11] Mayer 1986, p. 275.
[12] ILA Interim Report, p. 4.
[13] Koulu 2007, p. 249.
[14] Lew 1978, p. 532.

law other than the one governing the parties' contract, may in certain cases be considered as such public policy. Public policies may take either a *positive* or a *negative* function.[15] When performing the positive function, the notion of public policy allows the application of a rule of law foreign to the otherwise applicable law. For example, the arbitrator or the enforcement judge could apply a trade sanction outside the choice of law by the parties. The negative function on the other hand allows the non-application of such provisions of the applicable law that would run counter to the interests protected by the public policies. Hence, if a sanction in the applicable law is deemed discriminatory, its application may be avoided through the public policy exception. As will be shown below, both facets of the public policy exception may become applicable in relation to trade sanctions: the trade sanctions may be applied as public policy rules despite a contrary choice of law, or alternatively, the otherwise applicable sanction may be barred applicability on the basis that its application would contravene public policy.

If an arbitrator fails to consider a trade sanction there still remains the possibility that a national court would give the sanction effect in setting aside or recognition and enforcement proceedings. As a matter of principle, national judiciaries are not allowed to review arbitral awards on their merits, but in certain cases, when the outcome of the award would run counter to the public policy standards of the concerned state, a limited review may be possible.[16] In these cases, the national judiciaries may set the award aside or refuse recognition and enforcement only when the award has failed to consider some essential provision of the law of that judiciary, or when it has considered a foreign rule of law whose application would constitute a breach of a fundamental principle at the place of the court review.[17]

As a preliminary terminological remark, it must be underlined that the concept of mandatory rules, or public policy rules, in private international law and arbitration differs from that of purely national situations.[18] Mandatory rules and public policy rules in the context of this

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[15] See *i.a.* Lalive 1987, pp. 261–264.
[16] As regards Finnish law, see HE 202/1991 vp, p. 8.
[17] See *i.a.* Sections 40(1)(2) and 52(2) FAA.
[18] On the demarcation between public policy and mandatory rules, and their meanings within private international law and arbitration law, see chapter 3.2 below. At this point it suffices to quote Pierre Mayer's definition. According to him: "[*M*]*andatory rules of law are a matter of public policy (ordre public), and*

study shall refer to *internationally mandatory* or *overriding mandatory rules* that allow the judge not only to escape the contractual clauses that would be contrary to the domestic imperative provisions of law but also to disregard the otherwise valid choice of law by the parties, given that its application would result in a violation of public policy.[19] Therefore, in this study, references to mandatory rules or public policy rules should be understood as references to these types of internationally mandatory rules and international public policy, respectively.

1.2 Research questions and scope of study

Trade sanctions in international trade is a distinctively multifaceted and interdisciplinary topic that may be approached from a number of different angles. Political scientists and economists have established a notable body of research relating to the effects and effectiveness of economic sanctions.[20] The legal questions too have given rise to a considerable amount of research, pertaining to issues related to numerous fields of law: public international law[21], EU law[22], contract law and law of obligations[23], and private international law as well as international procedural law[24]. This study examines the issues of trade sanctions from the point of view of international arbitration and mostly focuses on the two last mentioned fields of law, *i.e.* on the choice of law issues and questions pertaining to setting aside, recognition and enforcement of arbitral awards. Questions pertaining to EU law, contract law, and public international law will be touched upon to the extent understanding them is necessary to understand the core issues of this study.

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moreover reflect a public policy so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws." Mayer 1986, p. 275.

[19] In this way, the positive function of the public policy exception closely resembles the exception of *overriding mandatory rules*, as it is known within private international law, most notably in relation to Rome Convention and the Rome I Regulation. This relationship is discussed in more detail below in chapter 3.2. Furthermore, as regards the distinction between *ordre public interne* (public policy applicable to national disputes) and *ordre public externe* (public policy as it is applied in international disputes), as they are known within the French legal tradition, all references to public policy shall be understood as references to the latter type of public policy, unless again specifically otherwise stated. See Taivalkoski 1997, p. 178 according to who Finnish arbitration law does not in fact know the category of *ordre public interne*.

[20] See *i.a.* Portela 2010.

[21] See *i.a.* Farrall 2007 and chapter 4.3 below.

[22] See *i.a.* Portela 2010 and chapter 3.4.2 below.

[23] See *i.a.* Brunner 2008 and Azeredo da Silveira 2014, pp. 197–352.

[24] See *i.a.* Azeredo da Silveira, pp. 35–190 and Marchand 2012, pp. 65–233.

For the sake of clarity, it should be emphasized that trade sanctions (and any other public policies, for that matter) may have an effect on decision-making on two separate levels:

1. in arbitral proceedings by the arbitrators;
   and/or
2. in national courts in relation to:
   a. enforcement and recognition proceedings of a foreign award; or
   b. setting aside proceedings.[25]

This study is bipartite in the sense that it discusses trade sanctions in both arbitral tribunals as well as in setting aside and recognition and enforcement proceedings. Following this distinction, this study tries to shed light on two distinct main research questions, formulated as follows:

1. Can Finnish courts set aside or refuse recognition and enforcement of an arbitral award on a public policy basis if that award has failed to consider relevant trade sanctions, or conversely, considered a trade sanction the application of which would be against Finnish public policy?
2. Are international arbitrators allowed, or obligated, to take foreign trade sanctions into account, and conversely, are they allowed to disregard certain trade sanctions in the otherwise applicable law if such sanctions would contravene public policies? If yes, how and under what conditions?[26]

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[25] A terminological matter should be noted here. Unlike for example the Article 34(2) UNCITRAL Model Law, Finnish as well as Swedish arbitration acts make a distinction between invalidity (*mitättömyys*, Section 40 FAA) and setting aside (*kumoaminen*, Section 41 FAA) of an award. Under FAA, a conflict with Finnish public policy leads to the invalidity of the award, whereas under Article 34 UNCITRAL Model Law, the public policy exception is treated merely as a grounds for setting aside the award. The distinction between setting aside and invalidity does however largely correspond to the distinction between the grounds that have to be invoked by parties and those that are applied ex officio by the court, as set out in Articles 34(2)(a) and 34(2)(b) of the Model Law (Sekolec – Eliasson 2006, p. 236) The difference is thus not of very much practical relevance. References to "setting aside" in this study will therefore include references to the invalidity in the context of Finnish or Swedish procedures, unless specifically noted otherwise. Interestingly it may be noted that the *travaux préparatoires* of the upcoming reform of the Swedish Arbitration Act (the "SAA") suggest that the distinction between setting aside and annulment will be removed from the Swedish legislation as well, leaving the Finnish law an international peculiarity. See SOU 2015:37, pp. 125–126.

[26] Chronologically one could be tempted to invert the order of the research questions and consider choice of law issues first and only after that dwell into matters of judicial setting aside or recognition and enforcement proceedings. However, since the arbitrator may preventively wish to consider and predict the actions of the national judiciaries in these proceedings (see chapter 4.5.3 below), the order of the research questions is inverted so that issues of setting aside and recognition and enforcement are covered first.

Both research questions are closely linked to and revolve around the problematics of public policies and mandatory rules in international arbitration, a topic that has at least on the international level inspired an abundance of discussion and literature.[27] They are essentially questions of balancing the state's security and political interests with the freedom of commerce and private party interests. Read together, the answers to the two research questions should shed light on how these interests should be balanced and whether the arbitrators or national judges should bear the responsibility of balancing the competing interests. Although the two research questions are in this way inherently linked to each other, the questions may and must nonetheless be approached from different angles. The first research question pertaining to annulation and recognition issues is better approached from a national law oriented, international procedural law perspective. The second research question, on the other hand, lies in the realm of private international law and arbitral choice of law, a distinctively international, even supranational topic. Both perspectives operate with the same or similar concepts, such as with the notion of *public policy*, but one must nonetheless pay special attention when transferring concepts from the auspices of one realm to another since the underlying rationale of each system of law is somewhat different.

Some earlier studies have been carried out to illuminate the issues of trade sanctions in arbitration and in national court proceedings.[28] Unlike most of these previous studies, this study does not discuss trade sanction in national courts as such. Trade sanctions in national courts are only discussed to the extent they relate to setting aside or recognition and enforcement proceedings, and to the extent they may serve as a source for analogy for arbitration related issues. Disregarding choice of law issues in national judiciaries and concentrating on arbitration helps to avoid the terminological confusion that necessarily ensues when transferring concepts within and between the realms of private international law and international arbitration. Also unlike the previous studies, this study does not dwell on the matters of material application of trade sanctions but rather retains to matters of choice of law and enforceability. Therefore, no suggestions are made as to how the trade sanctions should materially affect the parties' contractual relationship.

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[27] Some introductory, comprehensive or oft-quoted articles, see *i.a.* Barraclough–Waincymer 2005, Blessing 1997, Lalive 1987 and Mayer 1986.
[28] See most notably, Azeredo da Silveira 2014, Brunner 2008 and Marchand 2012.

This study is divided into five main chapters. After this first, introductory chapter, the second main chapter aims to clarify and systematize different categories of trade sanctions, issued by various different actors and having varying legal effects. Understanding the different types of trade sanctions and their differences is essential in understanding their application in arbitral and court proceedings. The research questions provided above will be mainly answered in chapters 3 and 4, answering research questions 1 and 2 respectively. The third chapter thus discusses the significance and effect of trade sanctions in setting aside and recognition and enforcement proceedings of arbitral awards. Here main focus will be on the state of the law in Finland. The fourth chapter will then discuss trade sanctions as they are applied by international arbitrators and the effect the sanctions may have on the choice of law in international arbitration. The fifth and final chapter of this study summarizes what has been presented in the first four chapters and presents some brief concluding remarks.

1.3 Research method

The primary method of this study is legal dogmatic, meaning that the subject of the research is the current state of law and the fundamental goal is to produce norm propositions, and to reduce the multiplicity of legal system into general sentences from which solutions to further questions can be sought.[29] The utilized legal dogmatic method has two sides or tasks, which together form its core area:

1. The *systematization* of the legal order by means of legal concepts; and
2. The *interpretation* of the legal order by means of exploring their substance.[30]

Both tasks are employed for the purposes of this study. The systematization task, *envisioning a kind of "concept tree" in which the basic set of concepts needed has been set in a hierarchical order*[31], is of particular importance, especially when discussing the second research question, trade sanctions and the choice of law issues in international arbitration. Since arbitral procedure, including its choice of law issues, is only lightly regulated, the researcher investigating these matters will have to structure a number of concepts into a deliberate structure, just in order to be able to interpret these provisions. Systematization is

[29] Aarnio 1977, p. 227 and 273 and Hirvonen 2011, p. 24.
[30] Aarnio 1978, p. 52.
[31] Aarnio 1977, p. 267.

needed in order to have a general framework within which one is able to make legal interpretations.[32] In the terminology of Aarnio, one could state that the *basic system*[33] of international arbitration allows a number of conceivable interpretations of its norms, which are vague and unspecific by nature.[34] When there are "systematic deficiencies" in the basic system, as there obviously are in the system of choice of law in international arbitration, the systematization has an important *creative* task, essential for unveiling the alternative solutions and the arguments that may be used to justify them.[35] Hence, especially as regards the second research question, the task of systematization plays an extremely vital role.

Indeed, the *systematic deficiencies* in the choice of law in international arbitration may be traced back to a discussion regarding the very nature of international arbitration and the source of its legitimacy. Hence, the fundamental question may be articulated as a question of whether the essential nature of international arbitration is *contractual*[36], whereby its legitimacy stems from the parties' agreement to arbitrate and the will of the parties; or *jurisdictional*[37], whereby its fundamental legitimacy can be traced back to the jurisdiction of a national legal system on which the arbitration is based; or in fact *autonomous*[38], whereby arbitration is conceived as a denationalized and transnational regime that is defined by commercial and arbitral custom and the purpose of arbitration: serving commercial interests.[39]

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[32] Aarnio 1978, p. 93.
[33] According to Aarnio, the existing legal order may be conceived as a system of norms, the *basic system*, that is *reformulated* (reorganized) by means of legal dogmatics into another system that has the same normative consequences as the first system but that is typically less extensive and more general. The systematization of legal order can be conceived as this reformulation of norms. See Aarnio 1977, p. 272.
[34] Aarnio 1978, p. 83.
[35] Aarnio 1977, p. 272 and Timonen 1998, p. 13.
[36] According to a purely contractualist conception, the parties have the power to stipulate all aspects of their procedure since arbitration is a contractual mechanism and not a judiciary, and thus the arbitrator must always act in accordance with the parties' agreement.
[37] For a proponent and early theorist of a pure form of jurisdictional theory see Mann 1967.
[38] See *i.a.* Goldman 1963 or Lalive 1987 on commentators favoring the autonomous approach. As Lew *et al.* described the theory: "*The autonomous theory looks to arbitration per se, what it does, what it aims to do, how and why it functions in the way it does. It recognises that the relevant laws have developed to help to facilitate the smooth working of arbitration.*" (Lew *et al*, 2003, p.81). According to the autonomous conception arbitration is an autonomous, denationalized and transnational regime that is defined by commercial and arbitral custom and the purpose of arbitration: serving commercial interests. The autonomous conception has been described as standing in the *opposite extreme of the jurisdictional theory* (Maniruzzaman 1998, p. 71) since under the conception arbitration is transnational and transcends national jurisdictions so that national jurisdictions should be given only limited weight.
[39] Today, most writers seem to advocate for a *hybrid* solution that combines elements from *contractual* and *jurisdictional* theories. Even under these hybrid regimes, however, the relative weight of jurisdictional and

Numerous fundamental questions of international arbitration can equally validly be answered in opposing ways, depending on the value one gives to the contractualist, jurisdictionalist and autonomous arguments and their underlying morals, and how one consequently systematizes the notions of international arbitration. For example, one could ask whether mandatory rules of *lex arbitri* have a special position in relation to other rules foreign to *lex causae*[40]; or whether national judiciaries are allowed to enforce their national public policies in *ex post* judicial proceedings over the award[41]; or whether the arbitrator is allowed to truly apply foreign mandatory rules,[42] and have different outcomes based on the values one puts on each conception of arbitration. Indeed, despite some attempts to analyze, coordinate and reconcile the differing interpretations of the nature of arbitration,[43] the fact remains that none of the conceptions has gained a significant and universal predominance over others, neither in practice nor in academia.[44] The answers to the research questions of this study are equally dependent on the answer one gives to the question regarding arbitration's nature and how one structures the fundamental question of nature of arbitration; if one emphasizes the contractualist and autonomous theories and their arguments, one would be more tempted to conclude that arbitrators should not interfere with the applicable law chosen by the parties, with or without its trade sanctions, whereas emphasizing the

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contractual arguments is for each author to decide. The *autonomous* theory is one of these hybrid theories. (Lew *et al.* 2003, p. 82). The autonomous conception has been described as standing in the *opposite extreme of the jurisdictional theory* (Maniruzzaman 1998, p. 71) since under the conception arbitration is transnational and transcends national jurisdictions so that national jurisdictions should be given only limited weight.

[40] Jurisdictionalists would assert that since the system's jurisdiction stems from the seat's legal order, the rules of the seat should be given preference over other mandatory rules, just as in national courts. Contractualists and supporters of the autonomous theory would be hesitant of such idea, since the law of the seat have little if any contact with the parties and their contract. On the matter of seat's rules in arbitral tribunals, see chapter 4.5.3 below.

[41] The proponents of the autonomous and contractual theory would stand against such application: as arbitration is a creation of international commerce/ the parties' will, it would be wrong for national judiciaries to intervene with their autonomy. Jurisdictionalists would hold the opposite view. On the national judiciaries' power to interfere with the award, see chapter 3 below.

[42] The contractual approach would be to assert that arbitrator should not deviate from the parties' will even if certain public interests were at stake. The supporters of the *autonomous* approach, on the other hand, would contend that transnational notions of public policy should suffice to secure public interests (see the chapter 4.3 on transnational public policies below). Further, jurisdictionalists would emphasize the significance of the public policy control at the stage of arbitration and the duty of the arbitrators to consider national interests of connected states (see chapter 4.5 below).

[43] See for example Barraclough – Waincymer 2005, pp. 224–243 who suggest that a *hybrid* regime under which the legitimacy stems from both contractual and jurisdictional sources should be preferred and a number of factors should be considered when assessing public policy issues. As concluded by Barraclough and Waincymer, even such hybrid regime nonetheless leaves the arbitrator with a wide discretion in applying the public policy rules.

[44] Barraclough – Waincymer 2005, p. 244 and Maniruzzaman 1998, p. 66.

jurisdictional arguments would more probably lead to applying trade sanctions in foreign laws or disregarding certain sanctions of the otherwise applicable law, since as judiciaries, arbitrators are obligated to respect certain minimum legal and moral standards. This study attempts to systematize and present the different solutions, based on different premises, and apply these ideas to the field of trade sanctions.

As regards the first research question, the task of systematization plays a more limited, yet nonetheless significant task. The scope of binding legislation in the field of setting aside and enforcement is too very limited, yet broader than in relation to choice of law matters in arbitral tribunals. Therefore, the task of systemizing may be employed to a lesser extent than in relation to the second research question. However, the basic dilemma of international arbitration has also an effect in determining whether the award should be set aside or refused enforcement: the determination whether the judge too should respect the parties' will or alternatively impose some mandatory legislation in disregard thereof to protect the interests in its *lex fori* will depend on the answer given on the question of the nature of international arbitration. Emphasizing contractual values would imply the permanence of arbitral awards whereas jurisdictional arguments would stand supportive of protection of national interests. National legislation does, however, limit the judge's ability to freely position himself on this continuum.

Following the adopted systematization, the legal rules concerning both research questions must also be *interpreted* against the framework of the given legal system. Given the light mode of regulation employed by national and supranational regulators, semantic argumentation will have only secondary importance in this study, and other types of argumentation, such as teleological and value-based arguments are used to prove the proposed solutions.[45] Indeed, given the close relation between questions of public policy and the notions of morality and fundamental values, value based argumentation will be given relatively much weight.

[45] On the types of arguments deployed for interpretation purposes, see Hirvonen 2011, pp. 38–40.

Finally, certain remarks regarding sources of law merit attention. As emphasized above, the research questions asked are regulated in binding sources of law only to a limited extent.[46] Since international arbitration may in this manner be conceived, to a large extent, as autonomous of nation states, it is therefore only natural that less binding sources of law, such as published arbitral awards, international recommendations and conventions, as well as the extensive international literature on arbitration will be given more weight than in many other fields of law. Also, given that a large share of arbitrations happen under some institutional arbitration rules, these rules are used to uncover the widely held practices in arbitration.

Furthermore, Finnish law and jurisprudence provide only a limited offset for unveiling the problematics of recognizing and enforcing arbitral awards, *i.e.* the first research question. Hence, even for these purposes, international jurisprudence and case law will have to be employed with the intention of providing the backdrop against which Finnish legislation is interpreted. Indeed, since the Finnish arbitration law is largely based on international harmonization measures[47] and implements the New York Convention[48] diligently[49], international comparisons will provide essential for the purposes of this study. It is a specific feature of international arbitration that foreign court decisions may be relied upon even in interpreting the national law of arbitration in purely domestic situations.[50] Given the similarities between the Finnish and Swedish judicial systems and arbitration law, and the notable positions Sweden and Stockholm hold in the universe of international arbitration, special emphasis in this respect will be given to the Swedish legislation, literature and precedents. Also the case law of other major places of arbitration such as Switzerland and England will be looked into. The relatively numerous references to the US court praxis are on the other hand a direct consequence of the active sanctions policy the US has been practicing. The comparative method and understanding the state of law in these countries is, however, not an end in itself but rather only a tool for the legal dogmatic means.

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[46] On the classification between *binding* (*strongly* and *weakly*) and *permitted* sources of law, see Hirvonen 2011, p. 43.
[47] Even though the FAA is not directly based on the UNCITRAL Model Law, it to a large extent inspired by it and in this way follows the international harmonization tendencies. See Taivalkoski 1997, p. 133.
[48] Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in New York on 10 June 1958 (the "New York Convention").
[49] HE 202/1991 vp, p. 9.
[50] Heuman 1999, p. 43. See also, Koulu 2007, p. 62.

Besides international comparisons, reference may also be sought from the realms of private international law[51] and international procedural law.[52] Sources of international procedural law – case law and literature relating to the refusal of recognition and enforcement of foreign *judgments* – could be used as a tool when assessing the public policy exception under Finnish arbitration law.[53] Arbitration's roots in procedural law and the similarity of the concepts used in arbitration and in international procedural law provide attractive reasons for analogous application of certain sources of international procedural law, most notably the Brussels I Regulation[54], and the case law relating thereto.[55]

Far-reaching conclusions based on international procedural law instruments should nonetheless be avoided since this type of regulation is generally explicitly inapplicable to arbitration proceedings and subordinate to arbitration-specific instruments such as the New York Convention.[56] Enforcement of judicial decisions is based on the principle of mutual trust between member states, whereas no such principle exists in relation to arbitrators that are not member state judiciaries. This alone means that the systems are not identical.[57] Additionally, Finnish as well as EU practice in relation to recognition of foreign judgments is almost as sparse as it is for recognition of foreign awards, and hence instruments of international procedural law and private international law offer only a limited set of tools for outlining and answering the issues of public policy in international arbitration.[58]

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[51] Most notably, see the analoguous application of certain private international law instruments in chapter 4.5.4 below.
[52] Koulu 2007, pp. 247–253.
[53] Koulu 2007, p. 249.
[54] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).
[55] See the discussion in chapter 3.5.1 below and Koulu 2007, pp. 54–55.
[56] See *i.a.* Brussels I Regulation, preamble 12.
[57] Klami – Kuisma 2000, p. 269 and Landolt 2006, p. 202, footnote 108 rightly emphasizing that in case of recognizing and enforcing foreign judgments, the court delivering the judgment and the one enforcing have an equal responsibility to respect the mandatory rules whereas in the case of arbitration, the tribunals are not under a legal responsibility to ensure the proper application of mandatory EU law. See also the 1982 Case C-102/81 (Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co KG) where the CJEU concluded that an arbitral body is not a court or tribunal of a Member State as defined in Article 267 TFEU (ex Article 234).
[58] For example the Finnish Supreme Court has examined the notion of public policy in relation to recognition of foreign judgments in only 3 rulings, KKO 2013:80, KKO 2002:34 and KKO 2014:99, the first two of which concern judgments by default and the last one the interpretation of the EU Insolvency Regulation (European Community Regulation 1346/2000) and none of which discuss the contents of the principle *in extenso*.

2 Trade sanctions

2.1 Definitions

The subject of this study, trade sanctions, has been defined as "*government initiated ban[s] on trade with another state for reasons pertaining to foreign relations and in reaction [to] illegal or politically undesirable acts of that state*"[59] or more generally as "*measures that aim to prevent the flow of commodities or products to or from a target*".[60] Trade sanctions thus include both import and export prohibitions that are imposed by one state over another. For the purposes of this study, trade sanctions will also include retaliatory measures, *i.e.* counter-sanctions that are implemented by the targeted state in order to respond the original trade related measures.[61]

Together with *financial sanctions*, involving the hindrance of the flow of financial or economic resources as well as measures such as asset freezes or interruptions of commercial or official finance[62], trade sanctions form a category of economic sanctions: "*coercive economic measures taken against one or more countries to attempt to force a change in policies, or at least to demonstrate the sanctioning country's opinion of another's policies*".[63] All such economic sanctions are geared to exercise economic pressure on another actor and typically intended to produce a political change in their behavior.[64] Financial sanctions will not be at the center of this study and are as a general rule not discussed.

In addition to economic sanctions (*i.e.* trade sanctions and financial sanctions), also other types of political measures such as diplomatic sanctions, travel sanctions, and measures affecting international transport of goods may be implemented by a state in order to achieve

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[59] Bohr 1993, p. 256.
[60] Farrall 2007, p. 107. In the same context, Farrall also notes that the term embargo is often used interchangeably with the term trade sanction, in including both import and export prohibitions, but sometimes also as to referring only to export prohibitions. In this study, the embargo is nonetheless used interchangeably with the term trade sanction and referring to both export and import prohibition. A number of writers, *i.a*. Bohr 1993, pp. 256–258, Burdeau 2003, pp. 753–776 and Lowenfeld 2002, p. 733 use similar terminology.
[61] *E.g.* Lowenfeld has in the context of international law defined that such countermeasures would not constitute economic sanctions. See Lowenfeld 2002, p. 698. From a private international law perspective, however, the question whether a sanction is a primary sanction or retaliatory measure, is of little importance.
[62] Farrall 2007, p. 107.
[63] Carter 1987, p. 1166.
[64] Azeredo da Silveira 2014, p. 15; Farrall 2007, p. 106 and Portela 2010, p. 21.

the desired political or other goal.[65] Needless to say, all such other sanctions fall outside the scope of this study, as this study discusses only trade sanctions.

Trade sanctions may be implemented in countless different forms. Indeed, no trade sanctions regime is alike, and the implemented tools for economic coercion may vary substantially between different sanctions programs.[66] Trade sanctions may be either *comprehensive* where all flow of commodities and products from and to the sanctioned state is prohibited, or *particular*, where the trade restrictions affect only certain categories of commodities and products and their imports or exports.[67] Most trade sanctions by the UN and the EU are generally very limited in the sense that they limit only the trade of limited categories of products and goods, such as arms or nuclear related products. Therefore, also the legal effects of the sanctions and their influence on the choice of law may vary between different sanctions regimes. Sanctions may also have different effects *rationae temporis*; some are in force indefinitely as long as the wished political goal has been achieved (or deemed unnecessary), whereas others are put in place for a limited time. In relation to given parties' contractual relations, trade sanctions may be either *subsequent* (the parties' contract was already in force at the time of the imposition of the sanction) or *antedecent* (the parties concluded their contract at a point in time when the sanction was already in force).

Most often, besides merely prohibiting the export or import of certain products or goods, the sanctions also prohibit the satisfaction of all claims, often including claims for recognition and enforcement of arbitral awards, in connection with the prohibitions set out in the sanction.[68]

Most trade sanctions claim to have *extraterritorial effects* in the sense that they strive not only to apply to transactions within the territory of the promulgating state (*non-*

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[65] Azeredo da Silveira 2014, pp. 14–15. The totality of all such sanctions, including economic sanctions, is in EU law referred to as *restrictive measures*. See *i.a.* Article 215 TFEU and the Regulations laid down on its authority as well as the Basic Principles on the Use of Restrictive Measures (Sanctions), 10198/1/04.
[66] Farrall 2010, p. 107.
[67] Farrall 2010, pp. 110–111.
[68] See *i.a.* Council Regulation (EU) No 692/2014 of 23 June 2014, on the prohibition of imports originating from Crimea or Council Regulation (EU) No 267/2012 of 23 March 2012 on prohibiting trade of nuclear technologies with Iran. See however also Council Regulation (EU) No 833/2014 of 31 July 2014 on the sectoral sanctions on *i.a.* oil related technologies and arms embargo against Russia that prohibits the satisfaction of claims but do not expressly state whether *i.a.* the enforcement of arbitral awards would constitute a claim in the sense of that regulation (compare to article 1 of Council Regulation (EU) 692/2014).

extraterritorial sanctions) but also based on the nationality or the place of residence of the sanction's subjects.[69] This links the questions of trade sanctions to the framework of public international law and to the questions of states' jurisdiction to prescribe rules that require application outside the promulgating state. The question whether the state has jurisdiction to prescribe *e.g.* trade sanctions over the parties may have effect on the question whether arbitrator should have the power, or a duty, to apply such rules in the parties dispute, even if the law containing the sanction was not the law chosen by the parties.[70]

It is generally held that states' may exercise their jurisdiction within their territory (*territoriality principle*) and on the basis of the nationality or the place of residence of the persons or entities subject to the jurisdiction (*nationality principle*) as well as based on the protection of the security interests of the promulgating state (*protection principle*).[71] As for sanctions that prescribe applicability outside the promulgating state and its citizens, based on the *effects* that certain activities may have within the sanctioning state, their status under public international law is largely disputed.[72] Different states may also define their jurisdiction to prescribe rules differently; for example the US has defined that its jurisdiction based on the nationality principle extends to companies, wherever incorpor.ated or located, but owned or controlled by US citizens or residents or by persons effectively present on US territory, or by companies incorporated or conducting business in the US. Such definition of nationality is much disputed under rules of public international law.[73]

For the purposes of this study, *extraterritorial trade sanctions* shall refer to all sanctions not based on the territorial principle, *i.e.* all sanctions outside the sphere of *non-extraterritorial*

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[69] See *i.a.* EU sanctions regulations that provide for effects based on the territorial and nationality principles, i.a. EU sanctions against Russia, Article 13 (Council Regulations 692/2014 and 833/2014), that purport to apply to *i.a. any person inside or outside the territory of the Union who is a national of a Member State; to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State* or *to any legal person, entity or body in respect of any business done in whole or in part within the Union.*

[70] See chapter 4.5.4 below.

[71] Brownlie 2008, pp. 300–304 and Lowenfeld 2002, pp. 742–746.

[72] Brownlie 2008, pp. 311–315 and Lowenfeld 2002, pp. 741–742.

[73] See Lowenfeld 2002, pp. 740–742 and the referred US Foreign Assets Control Regulations 31.CFR, §500.329 where the application of the trade sanction is extended to all foreign companies *controlled* by US entities. See for example District Court at the Hague in Compagnie Europeenne des Petroles S.A. v. Sensor Nederland B. V., 17. September 1982 where the Dutch court deemed that the US manner to define the scope of its trade sanctions based on the ownership or controlling by US citizens does not meet the requirements of international law and the extraterritorial application of US sanctions cannot be based on such definition of the nationality principle. The US rules were thus not given effect.

trade sanctions.[74] The *truly extraterritorial trade sanctions* are at hand where the sanction's scope exceeds that permitted by international law.

One further concept in relation to trade sanctions that must be mentioned is the notion of *blocking statutes* under which countries attempt to counterbalance and neutralize the impact of extraterritorial application of foreign trade sanctions. These measures have been taken especially in relation to the US's unilateral and truly extraterritorial trade sanctions against third states. The EU has *i.a.* adopted such blocking statutes to counter certain US sanctions against Iran, Libya and Cuba.[75] Under these statutes it is illegal for EU entities to comply with US trade sanctions and equally illegal to recognize or enforce judgments or awards that have given such sanctions effect.[76] These blocking statutes, in essence, constitute an obstacle over any assessment of the legitimacy of the foreign trade sanctions by national judiciaries or arbitrators resolving the dispute, since the assessment is already made by the legislator of the promulgating state.[77] They may also pose a tricky situation where an arbitrator or a judge could be faced with a conflict between a blocking statute on the one hand and the trade sanction the blocking statute attempts to neutralize on the other.

2.2 Multilateral and unilateral trade sanctions

Trade sanctions may be either multilateral or unilateral. Multilateral sanctions are adopted by the United Nations Security Council ("UNSC") and may be mandatory in the sense that UN can require states' compliance with them.[78] Unilateral trade sanctions[79] on the other hand are autonomously imposed by an individual state, group of states or by a supranational entity such as the EU with no direct connection to a UNSC decision. As will be noted below, the distinction between multilateral and unilateral sanctions may have a material impact on the

[74] Other writers opine that *extraterritorial sanctions* should refer to only the *truly extraterritorial sanctions*. For this type of definition, see Lowenfeld 2002, p. 741 who discusses the problem of extraterritorial application from the viewpoint of the states' jurisdiction and argues that sanctions based on nationality are accepted by the international law. See also Marchand 2012, pp. 204–205.
[75] See Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom.
[76] Articles 4 and 5 Council Regulation 2271/96.
[77] Cortese 2004, p. 745.
[78] Lowenfeld 2002, pp. 702–703.
[79] Unilateral trade sanctions are also sometimes referred to as *national trade sancitions* (Lowenfeld 2002, p. 731) or autonomous sanctions (Azeredo da Silveira 2014, p. 12).

applicability of the trade sanction in a dispute before an arbitral tribunal or in national setting aside or enforcement proceedings.

The UN's power to adopt multilateral trade sanctions is based on Articles 39 and 41 of the United Nations Charter ("UNC"). Article 39 provides that:

> "*The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.*"

Further, Article 41 UNC maintains that:

> "*The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.*"

Decisions of the UNSC under the above provisions do not, however, have mandatory effect on private individuals, but they are rather directed at, and impose on the member states of the UN a duty to implement the sanctions in their national legislation.[80] It is thus mainly the responsibility of the member states of the UN to implement the sanctions into their legislation and the means by which the UNSC resolutions are implemented may vary from one state to another.[81] Typically the national legislation implementing the UNSC sanctions is also more specific than the resolutions they reflect.[82] UN sanctions are economic and political tools the wordings of which do not normally refer to specific types of legal relationships but are in this manner rather vague.[83] In EU member states, UNSC Resolutions are implemented by means of the EU's CFSP and decisions and regulations of the Council of the European Union ("Council"). As will be described below, multilateral sanctions may

[80] See Article 25 UNC.
[81] Lowenfeld 2002, p. 704.
[82] Azeredo da Silveira 2014, p. 12.
[83] Burdeau 2001, pp. 272–273.

in certain cases nonetheless have an effect on the relationship between contractual parties, despite not having been duly implemented into the applicable legislation.[84]

Article 39 UNC also reserves the right for the UNSC to issue non-binding *recommendations*. These recommendations impose no obligation to follow the sanctions (*i.e.* no penalty follows from non-compliance) but on the other hand they guarantee that a state acting in accordance with such sanctions cannot be held responsible for the measures taken under the recommendation.[85] The United Nations General Assembly may also issue non-binding recommendations for countries to take action to impose trade sanctions.[86]

Unilateral trade sanctions are sanctions that are not based on binding UNSC resolutions and that are decided unilaterally by a state or by a supranational entity such as the EU. They may be either completely autonomous, or spontaneous, in the sense that they are imposed with no connection to any UNSC sanction, or they may alternatively impose additional or more extensive sanctions than those prescribed for in the relevant UNSC resolution.[87]

Some sanctions, especially multilateral sanctions or those taken following a UNSC resolution but taking more extensive measures, can be conceived as being taken for non-selfish goals, such as maintaining peace and international cooperation. Sometimes, however, unilateral sanctions may be used as a means of imposing essentially selfish interests. In this way, unilateral sanctions have sometimes been referred to as *political rules* in the sense that they are closely connected to certain economic, social and political legislative interests of one state and aim to promote purely its own public or economic interests.[88] It may prove difficult to draw a line between orthodox sanctions and the cases where the illicit limitations to free trade are merely disguised as trade sanction.[89]

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[84] See chapter 4.3 below.
[85] Lowenfeld 2002, p. 720.
[86] See *i.a.* UNGA Resolution A/RES/42/23 and UNGA Resolution A/RES/41/35 condemning the apartheid regime of South Africa and urging all states to impose economic sanctions against it.
[87] Azeredo da Silveira 2014, p. 12.
[88] See *i.a.* Moitry 1991, p. 361 and the example of India–Pakistan hostilities in Voser 1996, p. 353 and the referred ICC Award 1512.
[89] On this distinction see the *application-worthiness test* described above in chapters 4.3.2 and 4.5.4 below.

2.3 Trade sanctions under Finnish law

In practice all sanctions programs applied in Finland become applicable through the EU and its CFSP. EU sanctions regimes are implemented by means of Council Decisions and Regulations and may include sanctions unilaterally adopted by the EU, as well as multilateral trade sanctions originally issued by the UNSC. For the time being, as an EU member state, Finland has adopted trade sanctions such as export or import prohibitions against 25 different states[90] as well as certain restrictive measures against given individuals affiliated with terrorist activities. In all cases the measures are based on decisions and regulations issued by the Council. As regards of 6 out of the 25 states, the sanctions are imposed solely pursuant to the EU's autonomous CFSP powers without any UN involvement.[91] In the remaining 19 cases, the UNSC has also imposed at least some economic sanctions against the state sanctioned by the EU. In many cases, however, the EU has imposed further and more extensive autonomous sanctions not covered by UN Sanctions resolutions.[92]

The EU trade sanctions typically relate to trade of arms, other military equipment or dual-use technologies. In some cases, however, broader categories of products and services are affected. For example the current sanctions regimes against Syria, North Korea, and Russia include also other categories of goods and products.[93]

Besides EU sanctions, Section 1 Sanctions Act reserves Finland the theoretical possibility to implement UN sanctions autonomously of the EU. If the EU would be unable to adopt a sanctions regulation, or in the unlikely scenario where it would be deemed that the sanction as adopted by the EU was not comprehensive enough, the Finnish government is reserved

[90] These countries in alphabetical order are: Afghanistan, Belarus, Bosnia and Herzegovina, Central African Republic, China, Cote d'Ivoire, Democratic Republic of Congo, Egypt, Eritrea, Haiti, Iran, Iraq, Lebanon, Liberia, Libya, Myanmar, North Korea, Russia, Serbia, Somalia, South Sudan, Sudan, Syria, and Zimbabwe. Besides this, the Ministry for Foreign Affairs in Finland lists six additional states or individuals in these states against whom other types of sanctions, such as financial sanctions (most notably asset freezes) or travel bans are imposed. These states are: Guinea–Bissau, Moldavia, Republic of Guinea, Tunisia, Ukraine and Yemen (http://formin.finland.fi/pakotteet, accessed 20 August 2015).

[91] These six states are: Belarus, China, Myanmar, Russia, Syria and Zimbabwe (http://formin.finland.fi/pakotteet, accessed 20 August 2015).

[92] See *i.a.* the EU sanctions against North Korea and the Commission Implementing Regulation 2015/1062 that extends freezing of funds to certain individuals and entities not covered by any UNSC Sanction.

[93] See *i.a.* Council Regulation (EU) No 36/2012, prohibiting oil imports from Syria; Council Regulation (EC) No 329/2007, prohibiting exports of certain luxury goods to North Korea and Council Regulation (EU) No 692/2014 prohibiting the import of any products originating from Crimea/Sevastopol.

with the possibility to implement UN sanctions autonomously.[94] However, so far all UN sanctions have been adopted through EU regulations, and a recent Government Bill for the amendment of the Sanctions Act explicitly prescribes that autonomous sanctions outside the EU framework are no longer imposed.[95] Certain limited categories of trade restrictions, for example certain arms embargoes, may however have to be implemented nationally since they are based on Council decisions that do not bind member states as such.[96] Even in these limited cases, the national piece of legislation would contain a simple reference to the relevant Council Decision. In every case, virtually all major trade sanctions are enforced through Council Regulations. Autonomous Finnish sanctions are mostly a theoretical option, and are hence not discussed *in extenso* in this study.

Finally, under Finnish law, breaches of trade sanctions are criminally sanctioned as *regulation offences*. Regulation offences are incriminated under Chapter 46 Sections 1–3 Criminal Code (39/1889). Depending on the gravity of the offence, the penalty for regulation offences may range from a fine to four years in prison.

2.4 Trade sanctions and arbitrability

This study discusses trade sanctions and their relation to the public policy exception as it is known in international arbitration law. However, since issues of public policy and arbitrability are so closely entwined with each other[97] and since limited arbitrability may have effect on the application of trade sanctions as public policy rules, some quick remarks regarding the arbitrability of trade sanction issues merit attention.[98]

As a general rule, the mandatory or public law nature of a provision of law, be it trade sanction or any other rule of mandatory law, does not as such prevent the arbitrability of these matters.[99] After the mid-20th century, the scope of arbitrability has constantly expanded, making it ever more probable that also matters of trade sanctions may be subjected

[94] Björklund 2002, p. 64.
[95] HE 288/2014 vp, p. 4 and 17.
[96] HE 288/2014 vp, p. 17.
[97] The notion of arbitrability is commonly said to be included in the common concept of public policy. See *i.a.* HE 202/1991 vp, p. 30; SOU 1994:81, p. 173; prop. 1998/99:35, p. 142 and Born 2014, pp. 2700—2701.
[98] For a more comprehensive reviews of trade sanctions and arbitrability, see Azeredo da Silveira 2014, pp. 85–98; Burdeau 2003, pp. 758–762 and Cortese 2004, pp. 737–739.
[99] Heuman 1999, p. 156.

to arbitration.[100] This tendency is reflected in the modern international arbitral as well as judicial practice that has almost unanimously considered matters of trade sanctions arbitrable[101] This is equally true for issues pertaining to multilateral[102] as well as unilateral[103] trade sanctions.

Finnish arbitration law too is built on a broad notion of arbitrability. The general tendency to allow arbitration in matters relating to mandatory public law is predominant in Finland.[104] The *travaux préparatoires* of the SAA, a close corollary of Finnish arbitration law, explicitly state that foreign economic and political regulations are not likely to affect the arbitrability of a dispute.[105] No directly applicable Finnish case law seems to exist as to the arbitrability of trade sanctions but considering the international case law relating to the matter and the general pro-arbitration tendencies in Finland, it would seem very likely that arbitrators would be allowed to consider trade sanction matters in Finland.

[100] Burdeau 2003, pp. 758–759.
[101] See *i.a.* ICC Award 6719 and the Swiss Federal Tribunal decision ruling BGE 118 II 353 relating thereto. See however the Court of Appeal of Genoa in in the highly criticized *Fincantieri* (Fincantieri-Cantieri Navali Italiani SPA (Italy) v. Ministry of Defense of Iraq) ruling, relating to the same dispute as the ICC award 6719 and the Swiss Federal Tribunal decision. The Genoan court concluded that arbitration disputes relating to UN sanctions were not arbitrable and assumed jurisdiction over the dispute. The Italian view has been heavily criticized by writers (see *i.a.* Azeredo da Silveira p. 94–95 and Burdeau 2003, pp. 758–762) as well as judiciaries of other countries (see Cour d'appel de Paris 05/05404, refusing to enforce the Italian judgment in the dispute, asserting that the dispute was arbitrable and hence concluding that Italian courts did not have the jurisdiction to resolve the dispute) and should thus not be followed.
[102] Matray 1997, pp. 74–76; ICC Award n. 6719 and Quebec Court of Appeal 2003 CanLII 35834.
[103] Matray 1997, pp. 92–93.
[104] Ovaska 2007, p. 37 and Taivalkoski 1997, p. 142. See also the Helsinki Court of Appeal ruling HelHO S 01/1007, 22 August 2009, n:o 2419, where the Court of Appeal deemed matters relating to competition law arbitrable.
[105] SOU 1994:81 p. 79.

3 Public policies and trade sanctions in Finnish setting aside and recognition proceedings

3.1 Introduction

The following chapter discusses the fundamentals of Finnish legislation relating to setting aside as well as recognition and enforcement of arbitral awards. In particular, the following chapter will concentrate on the public policy exceptions that may allow the taking of certain trade sanctions into consideration, or alternatively, allow disregarding a sanction that could be conceived to contravene with the concept of public policy as it is understood in Finland. It should again be emphasized that in Finland, as in most other developed jurisdictions, arbitral awards are final in the sense that no appeal to national courts is available to alter the material outcome of the award.[106] However, the public policy exception provides a possibility, albeit a limited one, to intervene with an arbitral award if the award would result in an outcome that would be against certain fundamental economic, legal, moral, political, religious or social standards (public policies) that the state wishes to protect. The following subchapters thus discuss under what conditions trade sanctions may or may not be considered as public policies which would permit the courts at the place of arbitration or enforcement intervene with the award.

This third chapter will start by looking into the very nature of the public policy exception. This is done through the examination of certain international interpretative guidelines in relation to the public policy exception, categorizing the different types of cases where material public policies may have effect in recognition and enforcement proceedings.[107] This categorization will then enable the understanding of the public policy exception and its nature in a Finnish context. The notion of Finnish public policy in arbitration related judicial proceedings is first discussed on a more general level, without taking a specific stand on trade sanctions. First, the procedural framework for applying principles of public policy in setting aside and recognition and enforcement proceedings is discussed.[108] The following subchapter then briefly looks into the *material scope* of autonomous Finnish public policy.[109]

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[106] HE 202/1991 vp, p. 8.
[107] Chapter 3.2.
[108] Chapter 3.3.1.
[109] Chapter 3.3.2.

The possibility to apply trade sanctions as Finnish, autonomous public policies is then discussed in chapter 3.4. The notion of EU public policy, essential in relation to trade sanctions implemented through an EU framework, is discussed in the final subchapters of this third chapter.[110] The final subchapter on EU public policy contains the most notable findings as regards the first research question.

3.2 Categories of public policy

In order to grasp the notion of public policies in international arbitration, and in order to enable their interpretation in the relative absence of national coercive legislation and guidelines for interpretation, international guidelines may be resorted to. The national framework in relation to the refusal of recognition and enforcement is in most countries based on the 1958 New York Convention and its article V which exhaustively sets out the grounds based on which the enforcement and recognition of a foreign award may be refused. The Convention's article V(2)(b) sets out the public policy exception:

> *2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:*
>
> *[…]*
>
> *(b) The recognition or enforcement of the award would be contrary to the public policy of that country.*

This provision may be considered the basis on which most national conceptions of public policy in international arbitration are based. Hence, given the international nature of the arbitration laws and their enforcement provisions, international considerations should thus be given particular weight when interpreting them.[111] The New York Convention does not, however, provide much help in interpreting the provision.

[110] Chapters 3.5.1 and 3.5.2.
[111] Koulu 2007, pp. 250–251 and Kurkela–Uoti 1995, p. 51.

For this purpose, an international set of recommendations such as the ILA Recommendations[112] may prove useful in constructing a general framework of public policies in international arbitration, *i.e.* to systematize the field, and to understand the different forms in which public policies may have effect on the parties' dispute. The Recommendations are hence not used here to assist the *interpretation* of the public policy exception but mainly only to *systematize* the relevant field and to understand the different forms of the same phenomenon. The adopted general framework may then in the following be used to consider issues of public policy in a Finnish perspective.[113]

The ILA Recommendations and their explanatory notes, the Interim and the Final Reports purport to facilitate the consistency and predictability in the interpretation and application of public policy exception in the New York Convention.[114] Although the ILA Recommendations have no imperative value as such, they have often been regarded as forming a notable corpus of interpretative guidelines that reflects somewhat of a consensus among practitioners and represent the opinions of some of the most notable international scholars hailing from different backgrounds.[115] As the full name of the ILA Recommendations, the *International Law Association's Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Award*, suggests, the Recommendations only apply to the notion of public policy as it is applied in national courts in relation to recognition and enforcement proceedings. As will be shown below, they may also be used to understand and classify public policies and mandatory rules as they are applied in setting aside proceedings, or even in arbitral tribunals.

The Recommendations have defined the public policy as consisting of three constituent elements:

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[112] International Law Association's Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Award.
[113] See chapters 3.3.2–3.4.2 below.
[114] ILA Recommendations p. 1.
[115] See *i.a.* Koulu 2007, p. 68 and 250 and Svea Court of Appeal, 2 July 2012, Case No. T 611-11 where the Svea Court of Appeal based its judgment in setting aside proceedings on the ILA Recommendations. The positions adopted in ILA Recommendations do not, however, represent a unanimous opinion of practitioners worldwide. Instead, as will be discussed below in this chapter, a number of authors disagree with the position with regard to *lois de police*, adopted in the ILA Recommendations, according to which public policy rules or *lois de police* should be discussed through the public policy mechanism.

1. *Fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned;*
2. *Rules designed to serve the essential political, social or economic interests of the State, these being known as "lois de police" or "public policy rules"; and*
3. *The duty of the State to respect its obligations towards other States or international organisations.*[116]

Although the boundaries between the above categories are not at all strict and rule may fall into more than one category, they may provide useful guidance when assessing certain public policy rules such as trade sanctions.[117] For example, and as elaborated more detail below, a trade sanction could in different situations be classified as either a public policy rule or an international obligation by a state. How the sanction is classified may also have some practical consequences on its application.

The first category, fundamental principles pertaining to justice or morality, is said to cover principles of good faith, *pacta sunt servanda* and prohibitions of abuse of rights, discrimination and activities that are *contra bonos mores* such as piracy, terrorism, genocide, slavery and drug trafficking.[118]

With regard to trade sanctions, the category of fundamental principles should in most cases not become applicable. It is possible, however, to consider certain *foreign* trade sanctions at the stage of enforcement to be against some national *fundamental principles* so that the enforcement judiciaries would be unable to give the foreign provisions effect. This could be the case where a sanction in the applicable law would be obviously discriminatory. Even in these cases, the category of fundamental principles would have effect through the two other categories.[119] It is also imaginable that the enforcement court would hold itself bound to apply the sanctions of certain countries so as not to breach some fundamental principles of their own law. For example in *Regazzoni*[120], an English court gave effect to an Indian export prohibition, outside the applicable English law, on the basis that it would be against the

[116] ILA Recommendation 2002, p. 1.
[117] See ILA Recommendation 2002 p. 1.
[118] ILA Final Report pp. 6–7.
[119] Fundamental principle arguments could be fed by resorting to mandatory rules of law or by resorting to international obligations such as human rights conventions.
[120] See the court ruling in Regazzoni v. K. C. Sethia [1958] AC 301.

principles of British public policy render a judgment that would be contrary to the laws of a friendly state, and potentially to promote racial discrimination policies of the South Africa. As will be discussed below, this latter type of *comity* argumentation, typical to the English judiciaries, should not however as a general rule be extended to apply to setting aside as well as recognition and enforcement proceedings in Finland.[121]

The second category, "*lois de police*" or "public policy rules", *i.e. mandatory rules*[122], form the most notable part of so called positive public policy, *i.e.* rules that must be applied irrespective of the parties' choice of law. According to Mayer: *"[A] mandatory rule…is an imperative provision of law which must be applied to an international relationship irrespective of the law that governs that relationship".* In this sense, mandatory rules of law always perform a positive function; they are applied besides or instead of otherwise applicable law.[123]

There has, however, been discussion as to whether all of the mandatory rules of a given state form a part of that state's public policy. It could rightly be argued that there are some rules of law that could be classified by courts of law or international arbitrators as having a mandatory effect, even if they did not form a part of the state's public policy, *i.e.* fundamental values and standards of that country.[124] It may also be asked whether trade sanctions, at least directly, protect the most fundamental values of a nation. Conceived this way, only the fundamental principles themselves are protected, not the given mandatory rules of each state in themselves. Trade sanctions are most often indeed mere political tools, geared to induce pressure to achieve fundamentally selfish political goals. Nevertheless, drawing a distinction between merely political measures and those pertaining to "true" public policy does not seem fruitful for the purposes of national judiciaries, as the these courts employing the public policy exception will generally only look to their own legislation, and only exceptionally should they consider that their own legislation would be against some fundamental principles

[121] See chapter 3.4.2 below.
[122] Also known as *lois d'application immediate (laws of immediate application)*. Mandatory rules of law, *lois d'application immediate* and *lois de police* have usually been perceived as synonymous concepts. The term *lois d'application immédiate* does, however, emphasize the mechanism of application of rule, whereas the term *lois de police* stresses its function. Regarding terminology, see Guedj 1991 pp. 665–670.
[123] Lalive 1987, pp. 263–264.
[124] Azeredo da Silveira 2014, pp. 56–57.

law.[125] Hence, all rules that are so mandatory that they warrant application in international arbitration, even if in contradiction with the otherwise applicable law, are for the purposes of this study considered public policy.

Some writers have, in relation to choice of law issues in arbitration, also strongly emphasized the strictly negative function of public policy and the juxtaposition of public policy and mandatory rules, stating *e.g.* that: *"public policy […] has a defensive function (that of a shield) unlike mandatory rules which have an attacking / aggressive function (that of a sword)*"[126]. Following this conception, public policy would only refer to the first (and potentially the third) category under ILA Recommendations, the fundamental principles (and perhaps states' international obligations). Since, the *travaux préparatoires* of the Finnish Arbitration Act ("FAA") clearly suggest that Finnish public policy also includes the positive facet of the notion[127], and this study discusses trade sanctions in both arbitration as well as in related judicial proceedings and hence builds its conception of public policies on a uniform standard of public policy. Hence, public policy refers to the entirety of all three categories, fundamental principles refer to the defensive function and public policy rules, or mandatory rules, to the aggressive function. Thus, for the purposes of this study and both of its research questions, mandatory rules will be considered as a matter of *public policy (ordre public), and moreover reflecting a public policy so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws.*[128]

The ILA Final Report expressly states that measures of embargo, blockade or boycott serve as examples of public policy rules.[129] This would seem to imply that according to the ILA Recommendations, unilateral sanctions, maybe even foreign ones, could be applied as public policy rules in recognition and enforcement proceedings, since the case of multilateral

[125] See chapter 3.4.2 below.
[126] Mistelis 2011, p. 292. See also Guedj 1991, p. 680 and for similar perceptions from a Finnish private international law perspective, see Klami–Kuisma 2000, pp. 76–80.
[127] See the discussion in chapter 3.3.2 below.
[128] Mayer 1986, p. 275.
[129] ILA Final Report, p. 7.

sanctions will be covered through the category of the state's international obligations. Whether or not this is true will be discussed in later chapters.[130]

The third category of public policy, states' obligations towards other states or international organizations, may play a notable role in applying trade sanctions as public policy. They are in a way a corollary to the category of *lois de* police, discussed above, but unlike them, the states' obligations towards other states are not based on the national law of a certain state, but rather on the collective of states, on UNSC Resolutions or international conventions. According to the ILA Recommendations, the archetype of this type of international public policy is a UNSC Resolution imposing trade sanctions.[131] Therefore it would seem clear that according to the ILA Recommendations, a multilateral trade sanction could become applicable under the public policy exception. Such international obligation would however only become *directly* applicable if the sanction had not been adopted and ratified by the country where refusal of recognition or enforcement is sought. Otherwise the national piece of legislation itself could be relied upon. There could be cases, however, where a state or the EU had failed to duly implement the UNSC sanction and thus it would be necessary to directly apply the international obligation itself.[132]

Having concluded this brief inspection on the possible categorization the public policy exception and of the manner in which it has been discerned internationally, the next question to be discussed is the general manner in which the Finnish procedural legislation allows the judge to consider public policy matters. In order to understand the scope of Finnish public policy, and to discuss whether trade sanctions fall inside or outside of that scope, it is, however, essentially important to understand the procedural framework in which the arbitral awards may be set aside or refused recognition and enforcement. Among other things, the below discusses whether the standard for public policy for setting aside is the same as for refusing recognition and enforcement.

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[130] See chapters 3.4 and 3.5.2 below.
[131] This is expressly stated in the ILA Final Report p. 7.
[132] On this issue, see chapter 3.4.1 below.

3.3 Public policy in Finland

3.3.1 Framework for setting aside or refusing recognition and enforcement in FAA

The concept of public policy, or *ordre public,* is in Finnish legislation and jurisprudence referred to as "*Suomen oikeusjärjestyksen perusteet*", literally the "fundamentals of Finnish legal order".[133] Finnish legal practice or literature do not offer a clear definition for the concept.[134] It has been noted that the concept is constantly evolving, making a complete list of the rules that comprise the Finnish public policy a practical impossibility.[135] In Finnish arbitration law, the concept of public policy is referred to in Sections 40(1)(2) and 52(2) FAA. Section 40(1)(2) discusses the setting aside of an award whereas Section 52(2) contains the legal basis for refusal of recognition and enforcement of foreign arbitral awards. The recognition and enforcement provisions in Finnish and Swedish arbitration law, as well as in most other national arbitration laws, including the UNCITRAL Model Law, are based on the New York Convention.[136]

New York Convention Article V(2)(b) has been implemented into Finnish arbitration law with Section 52(2) FAA, providing that *an arbitral award rendered in a foreign state shall not be recognized to the extent that it is contrary to the public policy of Finland*. The Government Bill to Section 52 FAA includes an explicit reference to the New York Convention and states that the FAA must correspond with the convention.[137] Virtually no relevant national case law[138] and very little jurisprudential writings exist regarding the public policy exception in setting aside and enforcement proceedings in Finland. The lack of

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[133] See *e.g.* Sections 40(1)(2) and 52(2) FAA, discussed in more detail below. The principle of public policy is also sometimes referred to as "*ehdottomuusperiaate*", literally translated the "principle of absoluteness". On the terminology, see Esko 1993, pp. 116–117.
[134] Esko 1993, p. 121; Koulu 2007, p. 249 and Kurkela – Uoti 1994, p. 77. For an outline of the notions of mandatory rules and public policy within Finnish private international law, see Klami – Kuisma 2000, pp. 76–86.
[135] Esko 1993, p. 121.
[136] HE 202/1991 vp, p. 30; Prop.1998/99:35, p. 138, UNCITRAL Model Law Explanatory Note, p. 36.
[137] HE 202/1991 vp, p. 30.
[138] The Supreme Court of Finland appears to have explicitly assessed the notion of public policy in only one ruling and even there only in passing. In the said case, KKO 1989:24, the Supreme Court discussed the enforceability of a Czech award in the light of Czech insolvency law. The Supreme Court concluded that no breach of Finnish public policy was at hand in the case. Even here, the Supreme Court itself did not state on the public policy matters but rather contended to refer to the ruling by lower courts.

Finnish material and the deeply international character of international arbitration and especially New York Convention imply that when considering public policy matters under the FAA, special weight ought to be given to international and comparative law sources.

The provision in FAA governing the public policy exception in annulation proceedings, Section 40(1)(2) FAA states that *an award shall be null and void to the extent that the recognition of the award would be contrary to the public policy of Finland*. According to the Government Bill, an award is contrary to the Finnish public policy and thus null and void when it orders a remedy or a solution which is forbidden under Finnish law or when arbitrators have failed to follow a mandatory legal norm reflecting the fundamentals of Finnish legal order (a public policy norm).[139] Further, it is stated that an award is null and void only if the award is defect in a gross and essential manner.[140] The Government Bill provides no further assistance in interpreting the provision.

Unlike the recognition and enforcement procedure, the setting aside proceedings in Finland (or any other state for that matter) is not directly based on any major international convention such as the New York Convention but rather is national in character. In both the UNCITRAL Model Law as well as in the Finnish and Swedish arbitration laws, the grounds for setting aside an award, however, reflect the principles and even the wordings adopted in the New York Convention to a great extent.[141] Hence, especially with the growing popularity of international arbitration and especially with the adoption of the UNCITRAL Model Law by a number of major jurisdictions, the requirements for setting aside an award have in most jurisdictions become somewhat uniform and reflect the principles set out in the New York Convention.

Since both national recognition and enforcement as well as setting aside procedures essentially reflect the New York Convention, it has been assumed that the basic principles governing both types of national legislation would be the same. This is illustrated by the

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[139] Government Bill 202/1991 vp, p. 30.
[140] Government Bill 202/1991 vp, p. 8.
[141] See *i.a.* Taivalkoski 1997, p. 178; prop. 1998/99:35, p. 138 and UNCITRAL Model Law Explanatory Note p. 35. The Swedish government bill explicitly states in the context of setting aside provisions that the Swedish law shall be to a even greater extent be bound to the New York Convention's directions.

similar wordings between setting aside and recognition and enforcement provisions[142] as well as by the existence of the New York Convention Article V(1)(e) under which the recognition and enforcement of an award may be refused if it has been set aside by a competent authority of the country in which or under the law of which that award was made. What must be asked is whether the scope of the public policy exception under the New York Convention and under the relevant national setting aside provisions is *exactly* the same. Some jurisdictions seem to have adopted this view[143] whereas, most jurisdictions seem to recognize that the concept of public policy in setting aside procedure at least parallels the conception embodied in the New York Convention.[144] In some jurisdictions, *i.a.* in Switzerland, it has however been explicitly stated that the concept of public policy under the national setting aside regime is stricter than under New York Convention enforcement regime.[145] The Swiss conception of public policy in setting aside proceedings is therefore especially strict one (representing standards of *attenuated public policy*), partially because it becomes applicable only in truly international disputes. Unlike Swiss law, however, Finnish law does not make a distinction between the public policy applicable in purely domestic situations and the one applicable in international cases.[146]. Given the fundamental difference between the enforcement regimes between the countries, it would not be advisable to blindly follow the Swiss approach.

Thus, it could relatively safely be argued that the scope of the public policy exception under the FAA setting aside and recognition and enforcement provisions is also substantially the same, and when applying one of the provisions, inspiration could be sought from literature and case law relating to the other.[147] Article V(2)(b) and its embodiment in Section 52(2) FAA should serve at least as a general benchmark of public policy for setting aside proceedings under Section 40 FAA. As this study only discusses some general guidelines in

[142] Compare *i.a.* the wordings of public policy exceptions in Sections 40(1)(2) and 52(2) FAA or the grounds for setting aside in Section 41 and 53 FAA. Similarly, see Articles 34 and 36 UNCITRAL Model Law.
[143] See Born 2014, p. 3318 and the referred Singaporean ruling, based on UNCITRAL Model Law.
[144] Redfern *et al.* 2009, p. 595 and UNCITRAL Model Law Explanatory Note, p. 36.
[145] Geisinger *et al.* 2012, p. 429 and Poudret – Besson 2007, p. 770.
[146]Taivalkoski 1997, p. 178.
[147]See also Koulu 2007, p. 250 and Kurkela–Uoti 1995, p. 51, both stating that international influences should have a major influence in interpreting the setting aside provisions under the FAA.

relation to trade sanction and public policy matters, the two facets of public policy may as a general rule be considered convergent.

The application of setting aside provisions as well as the contents of the notion of public policy in relation thereto do, however, differ from one country to another, despite the uniform New York Convention background and some further attempts to unify their interpretation between countries.[148] In a given individual case, the country of enforcement may very well be different from the place of the arbitral proceedings, and the application and the substantive public policy may actually be different between the countries, since each country would most probably opt to apply their own public policies.[149] Also, it is not unheard of that a country would grant recognition and enforcement even if the award had been set aside due to public policy issues in another country. The fact that New York Convention Article V(1)(e) only states that set aside awards *may* be refused recognition and enforcement means that public policies of the seat will *de facto* become applicable only if the enforcing state chooses to give the Article V(1)(e) effect. Although most jurisdictions refuse to enforce set aside awards, some states, most notably France, have held that even vacated awards may under certain conditions be enforced.[150] The wording of Article 53(1)(5) FAA would suggest that Finnish judiciaries should not be left with this discretion and that vacated awards should not be enforced in Finland.[151] Despite some authors suggesting that the Article 53(1)(5) FAA should be interpreted in accordance with the New York Convention and allowing discretion in this manner,[152] it would be probable that Finnish judiciaries would follow Swedish[153] and

[148] On attempts to unify the interpretation see most notably ILA Recommendations 2002 as well as New York Convention Guide.
[149] UNCITRAL Model Law Explanatory Note, p. 35.
[150] Darwazeh 2010, pp. 308–310 and 324–343.
[151] Article 53(5) FAA reads:
"An arbitral award referred to in section 52 shall, however, not be recognized in Finland against a party who furnishes proof that
[…]
the arbitral award has not yet become binding on the parties or it has been declared null and void or set aside or suspended in the state in which, or under the law of which, that award was made." [unofficial translation]
Therefore, not refusing recognition and enforcement of an award would require a *contra legem* reading of the provision and its wording.
[152] Ovaska 2007, p. 268.
[153] See prop. 1998/99:35, p. 180; Hobér 2011, pp. 367–370; and NJA 1992 p 733.

German[154] examples, and as a general rule, deny recognition of vacated awards. Deeper analysis of enforceability of vacated awards, however, falls outside the scope of this study.[155]

Having concluded the brief analysis of the procedural nature of the public policy exception in Finnish arbitration law, the following question is what public policies may prevent the enforcement of foreign awards or be used to set aside an award in Finland. Hence, before more specific discussion on trade sanctions as public policies[156], a general review of what has been considered to compose Finnish public policy is presented.

3.3.2 Material scope of Finnish public policy

Prior to the current FAA, some commentators have suggested that Finnish judges *in commercial disputes* should as a general rule only be allowed to apply *procedural* public policies in foreign judgments' recognition and enforcement proceedings.[157] If this were true, courts would in every case be unable to give the trade sanctions any effect, had the arbitral tribunal failed to address them in their award. This could have significance especially in situations where the trade sanction was implemented after rendering the award but before applying for its recognition.

The non-applicability of all substantive public policies is said to follow from the fact that public policies should only protect the most fundamental moral values of each society, and that such morals should not become applicable in commercial disputes.[158] The Finnish Supreme Court has even with the current FAA in force, stated *obiter dictum* that only clear errors of formal nature and relatively gross procedural errors may cause the nullity or the setting aside of an award.[159] The context of the statement, however, clearly suggests that the statement is first and foremost made to emphasize the permanence of arbitral awards and not

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[154] Darwazeh 2010, pp. 329–330.
[155] For a general introduction to the question of enforcing set aside awards, see Gaillard 1999 and Darwazeh 2010.
[156] See chapter 3.4 below.
[157] Buure-Hägglund – Esko 1980, pp. 34–35.
[158] Buure-Hägglund – Esko 1980, pp. 34–35. See also Esko 1993, p. 117. It should be noted however, that internationally it is not unheard of that a commercial dispute would deal with matters that would touch the fundamental moral values of certain societies. See *e.g.* the arbitration related House of Lords case Regazzoni v. K. C. Sethia where the apartheid policies of South Africa were indirectly taken into account when assessing whether the morality of trade sanctions against South Africa under the applicable English law.
[159] KKO 2008:77.

to make a statement regarding application of material public policy rules.[160] Even if it would be exaggerating to interpret the statement as a categorical ban on the application of material grounds for setting aside an award, the ruling nonetheless emphasizes the extremely limited scope of court review that of foreign awards may go through in Finnish judiciaries.

Argumentation according to which only procedural public policy rules may be applied seems outdated today, as national courts in the EU are in fact under an obligation to apply certain EU laws as public policy rules, even in commercial disputes[161] and Finnish courts have at least in one instance refused recognition of an award due to material EU public policy[162]. Also the Government Bill to the FAA strongly implies that material public policies may become applicable in setting aside proceedings, even in non-EU related cases.[163] Hence, material public policies, such as trade sanctions, may virtually certainly in some cases become applicable. The Government Bill regarding Section 40 FAA on the annulation of arbitral awards clearly states that if an award orders a performance that is forbidden in law, the award may be annulled. According to Heuman, this is the essential content of the allowed material public policy.[164]

It is, however, to be emphasized that the public policy exceptions in Sections 40(1)(2) and 52(2) FAA are to be interpreted restrictively, so as not to allow unfounded and artificial appeal on the award.[165] Not all mandatory rules of the forum constitute its public policy.[166]

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[160] The statement is apparently made in relation to grounds for setting aside an award, in the limited sense, as they are listed in section 41 FAA (and not in relation to grounds for *nullity* in Section 40 FAA, such as the public policy principle) although the wording of the statement erroneously mentions the consequence of nullity as well. The statement has thus clearly unintentionally and incorrectly mentioned the consequence nullity in this connection.

[161] See chapter 3.4.2 below.

[162] HelHO S13/433, 14 October 2013, n:o 2705. The Turku Court of Appeal has also *obiter dictum* confirmed that errors in substance may in some cases qualify as grounds for refusal of recognition, see THO S09-2423, 22 December 2010, n:o 3134.

[163] Although the Government Bill states that in relation to setting aside *traditionally arbitral awards must only fulfill certain requirements of mainly formal nature* (HE 202/1991 vp, p. 8) the detailed reasoning in relation to Article 40 FAA in the same Government Bill states that an award may be deemed null and void *i.a.* when the award orders a remedy or solution which is forbidden under Finnish law (HE 202/1991 vp, p. 25).

[164] Heuman 1999, p. 603.

[165] See Savola 2015, p. 18, stating that it would be safe to assume that Finnish courts would apply a very restricted criterion of public policy when enforcement of foreign awards is sought. Indeed, in most cases the attempts to set aside or refuse recognition and enforcement of an award do not succeed. According to Hemmo, out of the 8 cases to have reached Finnish courts of appeal in 1995 to 2008, where the refusal of recognition or setting aside was sought on a public policy basis, none succeeded. See Hemmo 2008, pp. 1062–1063 and 1066.

[166] HE 202/1991 vp, p. 25.

However, if the award orders a performance in kind, for example in breach with Finnish legislation, and leaves no other alternative than to perform in this manner, the enforcement judiciaries should not be forced to render a judgment that would force one of the parties to breach Finnish law, if the law constitutes Finnish public policy.[167] If the award on the other hand allows performance in a manner that does not contradict with Finnish public policy, the award should not be set aside, or refused recognition and enforcement.

As it appears, arbitral awards may indeed be set aside or refused recognition and enforcement based on substantial public policy of that country. The question therefore remains whether trade sanctions constitute such public policy in Finland. This will be considered in the following subchapters.

3.4 Trade sanctions and national public policies

3.4.1 General remarks

Before discussing trade sanctions and the public policy exception in a more strict sense of the word, one further related consideration should be made. It should be asked whether the sanctions should at all be addressed through the public policy exception, or if the issue of compliance with sanctions may sufficiently well be addressed by in recovery proceedings or by other extrajudicial authorities. For example the Swiss Federal tribunal, as well as an US court of appeal, have ruled that the mere existence of an economic sanction against the creditor does not necessarily constitute public policy in the enforcement proceedings of an arbitral award, implying that the payment under the award may be prevented by other means in the execution proceedings, without having to resort to the notion of public policy in the enforcement judiciaries. The Swiss Federal Tribunal, for example, merely notified the authorities responsible for the implementation of economic sanctions in Switzerland to ensure that the claim, potentially involving breach of economic sanctions, would not

[167] Parties often agree that in case of non-delivery in kind, one of the parties may be deemed to be liable to pay liquidated damages. An award ordering payment of liquidated damages, due to non-performance based on an export prohibition or trade sanction should not as a general rule be deemed to breach public policy since it is merely part of the distribution of risks and liabilities between the parties. See the argumentation adopted in Svea Court of Appeal T 611-11. See also *Gould* (Ministry of Defence of Islamic Republic v. Gould Inc., 969 F.2d 764) where only the specific performance of delivery of military goods to Iran was deemed justify the partial setting aside of the award on a public policy basis.

ultimately be satisfied.[168] This type of procedure cannot, however, most probably be followed in relation to the enforcement of a number of EU trade sanctions. Under these EU sanctions regulations, the national courts are explicitly prohibited from satisfying claims on enforcement of arbitral awards.[169] In these cases the enforcing court is in principle under an obligation to address the sanctions through the public policy exception because otherwise it would act in breach of the sanctions regulation. If the wording of the sanction does not, however, explicitly require the national court to refrain from satisfying claims related to the sanctions, or if the question is of *setting aside* proceedings, it could be that a solution similar to that adopted by the Swiss and US judiciaries could in principle also be argued in Finland.[170]

The above described general framework, according to which awards may be refused recognition and enforcement or set aside, may and even must be applied to the realm of trade sanctions in a number of situations. The sanctions may procedurally be given effect through this domestic framework of public policy, but the material contents of the public policy exception in relation to trade sanctions follows typically from EU law.[171] Therefore the emphasis will be on the application of the notion of EU public policy. There are nonetheless some situations where purely national notions of public policy could have to be resorted to. This could be the case at least where:

1. The EU has failed to enact a sanction and the sanction had then subsequently been domestically enacted through the Sanctions Act or not enacted at all; or

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[168] See Swiss Federal Tribunal in 4A_250/2013 where the Swiss Federal Tribunal lined that the existence of a UN obligation to freeze Iranian assets, a *financial sanction*, implemented also by Switzerland, does not constitute public policy and may thus not be used to refuse recognition of an award, but nonetheless stated that it will send a copy of its judgment to the authority responsible for administering the sanctions, as the execution of the award could possibly breach Swiss sanctions regulations aimed against Iran. See also District Court of Delaware in *National Oil Corporation v. Libyan Sun Oil Company*, where the court deemed that the fact that the enforcement of the award could breach US financial sanctions against Libya did not as such constitute a breach of public policy and that only the execution of the award should be stayed.

[169] See *i.a.* Articles 1 and 6 Council Regulation (EU) No 692/2014 of 23 June 2014, as amended by Council Regulations (EU) No 825/2014 of 30 July 2014 and (EU) No 1351/2014 of 18 December 2014, on import prohibitions on goods originating from Crimea. See also Council Regulation (EU) No 267/2012 of 23 March 2012 on trade restrictions with Iran, containing similar provisions.

[170] What the procedure for this type of action were, would be unclear and depend on the particulars of each case. It could be for example that the enforcement court would completely disregard the existence of sanctions and trust the bailiff with the control of the sanctions. It could also be that the court would give its decision on enforcement of the award on the condition that the sanctions be lifted, since no unambiguous rule prohibiting such procedure seems to exist.

[171] See chapter 3.5 below.

2. The trade sanction has been embodied in foreign law, but the Finnish judiciaries would consider that
    a. the application; or
    b. the non-application by arbitrators of such law would result in contradiction with the Finnish domestic public policy.

As was already discussed above, the first mentioned case is highly unlikely, since according to the Government Bill for the amendment of the Sanctions Act, the Finnish government no longer imposes sanctions outside the auspices of the EU.[172] Should the EU for some reason fail to impose a UN sanction and should such an autonomous national sanction be imposed instead, the Finnish judiciaries would most likely require blatant and manifest violations of these sanctions before a breach of sanction could be deemed to contradict with Finnish public policy. As presented by Hemmo, arbitral awards are generally very strictly complied with by Finnish judiciaries and the public policy exception is very restrictively interpreted.[173]

As noted above, an award may be set aside *i.a.* when the award orders a remedy or solution which is forbidden under Finnish law.[174] Not only is breaching sanctions forbidden under Finnish law but also criminally sanctioned.[175] Furthermore, multilateral trade sanctions are part of Finland's international obligations, the primacy and significance of which in the Finnish legal system is well illustrated by the fact that it is in Section 1 of the Finnish Constitution (731/1999) where it is stated that Finland shall participate in international cooperation to protect peace and human rights and to develop the society. The first Section of the Constitution is said to illustrate the basis of values on which the Constitution is built.[176] With this backdrop, it would be very much imaginable that multilateral trade sanctions, international obligations in themselves and typically designed to protect peace or other core values of the international community, could be considered to form Finnish public policy.

Even if a UN sanction for whatever reason had not been imposed to the Finnish law, it could be possible that the Finnish judiciaries could set aside or refuse recognition of an award

[172] HE 288/2014 vp, p. 17.
[173] Hemmo 2008, pp. 1066–1067.
[174] HE 202/1991 vp, p. 25.
[175] See chapter 2.3 above. Similarly, breaching blocking statutes has also been sanctioned under Finnish law, although not in the Criminal Code (Article 3 Blocking Statute Act).
[176] HE 1/1998 vp, p. 71.

based on Finnish international obligations and fundamental principles. For example the ILA Recommendations name states' international obligations, the prime example of which is UNSC sanctions, as one of the categories of public policies.[177] Also the Swiss Federal Tribunal has prior to the Swiss accession to the UN considered that the existence of UN trade sanctions may be used to set aside an award that has failed to consider the sanctions and orders a performance in breach of the sanctions.[178] Following similar reasoning, it could be asserted that Finnish judiciaries should apply the sanctions as Finnish public policies even if they have not been transposed into Finnish law.[179] The existence of multilateral trade sanctions constitutes a presumption that the sanction could constitute a transnational, universal public policy.

As already noted above, the enforcing court should nonetheless apply the public policy exception only when truly necessary. Therefore, only if the contractual obligation whose performance would constitute a breach of public policy was an unavoidable consequence of the award with no alternatives such as payment of liquidated damages, should the court resort to public policy considerations.[180]

A second scenario where national courts could contemplate the refusal of recognition and enforcement of an award on a Finnish public policy basis, is one where a foreign trade sanction has been given effect in an award but the Finnish court would deem that the sanction and its underlying rationale would run counter to the fundamental principles of Finnish law. This question essentially pertains to the category of *fundamental principles*, or *states'*

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[177] See ILA Recommendations p. 3.

[178] BGer 4C.172/2000. The Swiss Federal Tribunal seems lately, after its accession to the UN, to have taken a potentially more stringent approach to the contents of UN sanctions as possible obstacles for recognition of arbitral awards. In a 2014 award 4A_250/2013, it concluded that the mere existence of UN mandated financial sanctions (*i.e.* not trade sanctions) against Iran may not be considered as a public policy obstacle to the performance of a contract between Israeli and Iranian parties, especially as the claimant had failed to invoke the existence of sanctions at lower courts.

[179] See also the German Supreme Court in II ZR 113/70 where the court deemed that a UNESCO convention prohibiting the export of cultural goods could be taken into account when assessing whether Nigerian legislation prohibiting exports of cultural goods could be taken into account even when Germany had not ratified the convention. This example too demonstrates that *states' international obligations* and multilateral treaties, even if not ratified by the state, may be taken into account when resolving a dispute.

[180] The performance hence has to be truly illegal. An illustrative example from American praxis is that of *Parsons* (U.S. Court of Appeals, Second Circuit 74-1642, 74-1676) where a mere diplomatic breakdown between US and Egypt was not enough to refuse recognition and enforcement of an award against an American party for the benefit of an Egyptian corporation. Given the general pro-enforcement tendencies in Finland, similar limited interpretations of the public policy exception could be expected.

obligations towards other states, as discussed above in relation to the ILA Recommendations. Could it be so that a fundamental principle of Finnish law could thwart the legitimate application of foreign law? Such situation seems unlikely, yet it is imaginable that the enforcement of an award would be opposed based on *e.g.* a racially motivated import ban that had been applied as a part of the otherwise applicable foreign law. In these cases, the racially motivated ban could in principle be opposed by resorting to notions of *bonos mores* or by invoking a human rights convention the state has concluded.

The vast majority of cases relating to trade sanctions, however, do not pertain to issues such as racial discrimination. Situations where the arbitral tribunal has simply failed to consider trade sanctions of a foreign country form a more realistic problem. The question could also be formulated as to whether Finnish judiciaries should consider the public policies and trade sanctions of foreign states. These issues are discussed in the following chapter.

3.4.2 Foreign trade sanctions as public policy in Finland

Answering the question of foreign laws and Finnish public policy should be started by examining the Finnish law pertaining to setting aside and refusal of recognition and enforcement of arbitral awards. As was already noted above, the wordings of Sections 52(2) and 40(1)(2) FAA expressly refer only to *Finnish* public policy.[181] Further, the FAA Government Bill sets out that an arbitral award should not be declared invalid in cases where no public interest is involved.[182] Strictly interpreted this would mean that no violation of foreign law would render the award unenforceable and that in such cases, Finnish public interest would always have to be concerned. The view that under New York Convention, public policy refers exclusively to the public policy of the enforcement state is also confirmed by a number of writers internationally.[183]

[181] Both provisions refer to "*Suomen oikeusjärjestyksen perusteet*", literally "the fundamentals of Finnish legal order". See also Article 34(b)(ii) Model Law and Section 33(2) SAA that provide an essentially similar wording. Even Article V.2(b) New York Convention refers to the" public policy of that country". The drafters of the convention did not thus seek to harmonize the application of the public policy exemption. See ILA Interim Report 2000, p. 8 and Born 2014, p. 3650.
[182] Government Bill 1991/202, p. 8.
[183] Gaillard–Savage 1999, pp. 954–955; ILA Interim Report p. 30 and Redfern *et al.* 2009, p. 657.

Some commentators have, however, expressed a contrary view promoting a very wide applicability of the public policy exception in the FAA. According to them, even foreign public policies, *i.e.* laws of countries other than Finland, could in certain cases be taken into account as public policy rules.[184] The interpretation would seem to be in line with British practice where national courts have deemed that they are even under an obligation to respect the public policies of other friendly countries, given that such rules would render the contractual performance illegal. For example in *Soleimany v. Soleimany*[185] the English Court of appeal refused to enforce an award based on Iranian revenue laws and export controls. The British view that puts weight to the comity between nations is internationally considered exceptional.[186]

The *IUGAS v. Naftogaz* ruling by the Svea Court of Appeal in Sweden could also be interpreted as pointing to the direction of wide applicability of foreign public policies. [187] In the said case, a dispute had risen between a Ukrainian and an Italian company over a gas delivery agreement under Swedish substantive law and with a reference to SCC arbitration. Subsequently, the SCC tribunal had in its decision ordered the appellant to deliver gas abroad despite alleged restrictions to gas exports set in the Ukrainian legislation. At the setting aside proceedings in the Svea Court of Appeal, the appellant thus purported that ordering to carry out the gas deliveries was against Swedish and Ukrainian public policies.[188] In its decision, the Swedish court concluded that Ukrainian public policy might in principle be applied in truly international situations, given that the public policy rule falls into the category of *international public policy*. However because no complete ban on gas exports was in place, the court of appeal concluded that international public policy could not have been violated.

Svea Court of Appeal's conception of international public policy raises questions even if international public policy was ultimately not applied in this individual case. In assessing the conformity with Swedish and Ukrainian public policies, the court of appeal has *de facto* invoked Ukrainian legislation under the denomination of international public policy. In this

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[184] Kurkela – Uoti 1994, p. 78 and Kurkela 1996, pp. 127–128.
[185] See Soleimany v. Soleimany [1999] QB 785.
[186] ILA Interim Report, p. 31.
[187] Svea Court of Appeal, 2 July 2012, Case No. T 611-11.
[188] The contents of Section 33 SAA on nullity of arbitral awards based on public policy exception are essentially convergent with the Section 40 FAA. Both state that the potentially nullified award shall be against the fundamentals of their respective country's legal order.

respect, the ruling is also somewhat imprecise in its definition of international public policy. Even though the ILA Recommendations, invoked by the Court of Appeal, seek to harmonize the contents of the international public policy exception and its relation to national public policy in international arbitration, the ILA Recommendations do not in any way stand supportive of the application of *foreign mandatory rules*.[189] The ILA Interim Report, a commentary to the ILA Recommendations even effectively states that foreign public policies should *not* be considered part of the public policy of the place of proceedings.[190] The concept of international public policy in the ILA Report should rather be interpreted as urging the national courts to refrain from creating their own innovative interpretations of public policies.[191] A guide by United Nations Commission on International Law ("UNCITRAL") on the interpretation of the New York Convention also suggests that courts should refrain from applying foreign public policies.[192] If the Swedish Court of Appeal would have wished to apply Swedish law in accordance with ILA Recommendations, it should not have applied any foreign public policies.

Under Finnish law, both Sections 40(1)(2) and 52(2) FAA refer to the fundamentals of *Finnish* legal order. An interpretation allowing the application of foreign public policies would seem to be in contradiction with the prevailing jurisprudential and interpretive view according to which acts issued by the parliament of Finland should, as a general rule, be interpreted according to their wording.[193] It has been argued that a *principle of regulatory economy*, should prevail, stating that no element of the legal text should be without significance.[194] Furthermore, both Finnish and Swedish scholars have emphasized that an expansive interpretation of statutory acts is allowed only to the extent such interpretation is not a linguistically excluded possibility.[195] As a consequence, all this would seem to imply that foreign public policy could only be taken into account only where it coincides with Finnish public policy, *i.e.* when Finnish national law contains essentially similar public

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[189] For what is meant by public policy in the ILA Recommendations, see ILA Final Report 2002, p. 3.
[190] ILA Interim Report, p. 30. The Interim Report states that the view in Germany, France and most other countries seems to be that foreign public policies should not be taken into account. The Report does however acknowledge that English court practice seems to enable the application of foreign public policy rules in certain cases, with a reference to the *Soleimany* case referred to above.
[191] Koulu 2007, p. 253.
[192] New York Convention Guide, Article V(2)(b), paragraph 21.
[193] Hirvonen 2011, p. 39.
[194] Aarnio 1982, p.103.
[195] Aarnio 1982, p. 107 and Peczenik 1975, p. 80.

policy provisions. This could be the case *i.a.* with multilateral trade sanctions that are imposed by the UN and shared by a number of countries.

The ruling in *IUGAS v. Naftogaz* could also naturally be read so that not following foreign trade restrictions (*i.e.* public policy rules, *lois de police*) would constitute a breach of some *fundamental principle* of the Swedish legal order and thus be against *Swedish* public policy. However, the argumentation according to which it is national public policy not to support activities that are illegal in other "civilized" jurisdictions[196] is not especially well founded, since the function of public policy control at the stage of enforcement or setting aside, is obviously not to reassess the parties' behavior under the otherwise applicable law, but rather to ensure that certain minimum standards *at the place of arbitration or enforcement* are respected.[197] The courts at the place of arbitration or enforcement should not aim to balance the parties' contractual relationship, let alone further third country interests at the parties' expense.

Based on the above remarks on the current legislation and case law, the only viable interpretation of the Finnish law provision regarding foreign public policies' applicability would seem to be that, as a general rule, no foreign public policies should be applied in Finnish setting aside or recognition and enforcement proceedings. Finnish judiciaries are only guardians of Finnish public policy.[198] Therefore, foreign unilateral sanctions that are not implemented in Finnish or EU legislation should not be taken into account as foreign public policies, and arbitral awards should not be set aside or denied recognition based on the fact that a foreign sanction was not respected. In cases like *IUGAS v. Naftogaz* discussed above, the party seeking to invoke the public policy exception may in most cases as well invoke it before the arbitral tribunal, or in the last instance in the courts of the country of enforcement. If the invoked rule actually is public policy in the said country, the courts there will in all probability agree apply it, often even *sua sponte*. The purpose of the judicial

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[196] Kurkela 1996, p. 128 and Voser 1996, p. 352.
[197] See also similar reasoning adopted in Swiss Supreme Court's reasoning in the *Hilmarton/OTV* case 17 April 1990. See also more recent BGE 132 III 389, where the Swiss Federal Tribunal concluded that EU competition law should not form a part of the Swiss public policy.
[198] For this reason, the state judiciaries should not give special weight to any public policy provisions of the *lex causae* either. Only when failing to follow the *lex causae's* public policy provisions also comprises a breach of the public policy of the seat of the court, should the public policy rules be given effect. Failing to follow the principle of party autonomy cannot therefore as such constitute a reason for refusing to recognize the award. See also Lalive 1987, p. 302.

control of arbitral awards at the place of arbitral proceedings is to guarantee certain minimum requirements pertaining to judicial relief and legal protection.[199] Since the public policy may be used to artificially promote illicit state interest on the parties' expense, expansive interpretations should be avoided and the arbitral award should be interfered with to the least extent possible.

3.5 EU public policy

3.5.1 EU public policy in general

In practice, all trade sanction applicable in Finland are implemented by means of EU regulations. Hence, EU legislation and the notion of public policy therein comprises an essential and imperative part of Finnish public policy for the purposes of this study.[200] EU law is part of Finnish legal order. In recent years, the EU has imposed its own conception of public policy into the member states' legislation, and if a trade sanction is deemed to form a part of this EU public policy, the award failing to give effect to the sanction may have to be set aside or denied recognition and enforcement in the member states' courts. These courts are in the last resort responsible for judicial control of compliance with EU law.[201]

In the field of EU public policies, most practical relevance and attention in literature is normally attributed to questions pertaining to EU competition law and most notably Article 101 TFEU[202]. In the well-known *Eco Swiss* judgment[203], the Court of Justice of the European Union ("CJEU") confirmed that the said article of the TFEU forms a part of *a community*

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[199] See Möller 1997, p. 84.
[200] Koulu 2007, p. 253. Generally on the notion of public policy in the EU, see Corthaut 2012.
[201] See Ovaska 2007, p. 255 and the CJEU *Nordsee* judgment C-102/81, where the CJEU confirmed that arbitral tribunals as such are not " courts or tribunals of member states" but nonetheless stressed the importance of national judicial review by stating that:
"[I]f questions of community law are raised in an arbitration resorted to by agreement the ordinary courts may be called upon to examine them […] in the course of a review of an arbitration award […] which they may be required to effect in case of an appeal or objection, in proceedings for leave to issue execution or by any other method of recourse available under the relevant national legislation".
[202] Consolidated version of the Treaty on the Functioning of the European Union (2012/C 326/01) ("TFEU").
[203] Case C-126/97, Eco Swiss China Time Ltd. v. Benetton International NV. The facts of the *Eco Swiss* case are as follows: *Benetton* had licensed *Eco Swiss* to manufacture watches and clocks under its trademark. Under their agreement, Eco Swiss was prohibited from selling the products outside Italy. This type of market sharing is as a general rule against EU competition law. The arbitrator in the case, resolving the parties' dispute had failed to take the competition law provisions into account. The question before Dutch judiciaries was essentially whether the award could be set aside based on the non-compliance with the EU competition law rules. The Dutch court then requested a preliminary ruling regarding the public policy status of the said rules.

public policy applicable by the national courts *ex officio*. The CJEU confirmed that if a court should follow national procedural rules, such as those pertaining to the domestic public policy exception, then the court is equally obligated to follow similar rules of EU nature.[204] This effectively means that national courts are deprived of their procedural autonomy under their respective national laws in defining the contents of their public policies, the general rule under EU law, and put under an obligation to follow EU public policy rules, as they are finally defined by the CJEU. Procedural autonomy, a notion that includes determining the contents of each member state's public policy is indeed the main rule under EU law, one that may be ousted based on principles of effectiveness and equivalence.[205] In *Eco Swiss*, the CJEU deemed that the effective protection of the internal market required the national procedural autonomy to be thwarted.

Besides the *Eco Swiss* case, the CJEU has in two more recent judgments, in *Mostaza Claro*[206] and *Asturcom*[207] ruled that certain consumer protection rules, namely the right for a customer to abstain from arbitration and have their case heard before a court of law, equally form a part of EU public policy. Otherwise European case law offers very little assistance in interpreting the position and contents of EU public policy in relation to the exequatur of arbitral awards. EU legislation too lacks a list or any other comprehensive method for determining which other rules constitute EU public policy. The case law relating to EU public policies in relation to enforcement of *judgments* offers little help either. In *Krombach,* the CJEU determined that the public policy exception under the Brussels Convention, the predecessor of the Brussels I Regulation, is of strict interpretation, may only be invoked in exceptional circumstances and that member states have some room for determining their

[204] *Eco Swiss*, paragraph 37 and Bermann 2012, p. 412.
[205] On the contents of the principles of equivalence and effectiveness, see Case C-168/05 Mostaza Claro v. Centro Móvil, paragraph 24.: *"According to settled case-law, in the absence of relevant Community rules, the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under Community law are a matter for the domestic legal order of each Member State, under the principle of the procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness)*". These principles have their base in Article 19 TEU according to which member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.
[206] Case C-168/05 Mostaza Claro v. Centro Móvil.
[207] Case C-40/08 Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira.

public policy but that room is limited by the EU law.[208] In the other notable case relating to the public policy exception under the Brussels regime, the *Maxicar* case[209], similar requirements were applied to competition law matters. These principles, while they very much remind the general principles under *i.a.* the New York Convention, do not offer much help in defining the contents of public policy in arbitral context. The contents of EU public policy will thus have to be determined on a provision-by-provision or field-by-field basis based on the coming practice of the CJEU.[210] How would such determination be made and on what basis should given rules be considered as forming a part of the EU public policy? These questions will be discussed below.

In *Eco Swiss*, the CJEU held that the public policy nature of certain provisions of law can at least in part be derived from the fact that such rules are "*essential to the accomplishment of the tasks entrusted to the Community and, in particular for the functioning of the internal market*".[211] *Mostaza Claro* and *Asturcom* confirmed this position, and further stated that certain consumer protection rules should be considered community public policy as they are "*essential to the accomplishment of the tasks entrusted to the Community and, in particular in raising the standard of living and the quality of life in the territory*".[212] The category of *rules essential to the accomplishment of the tasks entrusted to the [EU]*, recurring in the CJEU's rulings, seems to be a remarkably broad one and as such appears to allow the application of numerous provisions of law as international public policy. Different authors have in academic writings predicted that *i.a.* employee and environmental protection as well as occupational health and safety would in CJEU be regarded as such essential rules, thus constituting a part of EU public policy.[213] Also some liberal economic values, best exemplified by the free movement of goods, persons, services and capital, the very heart of European cooperation, have in literature often been considered as probable EU public policy rules.[214]

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[208] Case C-7/98 Dieter Krombach v. André Bamberski, paragraphs 29–45. In Krombach the question was of certain procedural public policy principles.
[209] Case C-38/98 Régie Nationale des Usines Renault SA v Maxicar SpA and Orazio Formento.
[210] Bermann 2011, p. 1207.
[211] *Eco Swiss*, paragraph 36.
[212] *Mostaza Claro*, paragraph 37 and *Asturcom*, paragraph 51.
[213] See Bermann 2012, pp. 418–419 and Schlosser 1997, pp. 86–87.
[214] Bermann 2012, p. 419.

The *Mostaza Claro* and *Asturcom* judgments have demonstrated that also secondary EU law may be applied as an EU public policy, if the values protected in the secondary EU law are deemed adequately important and protected in the EU treaties.[215] In *Mostaza Claro* and *Asturcom*, the CJEU emphasized the importance of public interest underlying the protection which the directive offered, and deduced the mandatory status of the provision from the fact that consumer protection advances the interest of raising the standard of living and quality of life, protected in Article 3 of the then European Community Treaty [216]. Such argumentation, underlining the *effet utile* of the piece of EU legislation, would seem to allow even broader conception of public policy than that previously applied in *Eco Swiss*. In *Eco Swiss*, the provision itself was essential to the accomplishment of the tasks entrusted to the Community whereas in *Mostaza Claro* and *Asturcom* only the aim of the directive is in this way essential. According to *Mostaza Claro*, the fact that a consumer protection rule promotes a goal that is necessary for the fulfilment of the internal market, one of the objectives of the community, results in the public policy status of that norm. Furthermore, it could even be asserted that a widely held EU principle, the principle of proportionality suggests that EU should not be warranted to enact legislation unless it is necessary for the objectives of the Treaties. Therefore, under the reasoning adopted in *Mostaza Claro*, a notably large part, maybe even all of all EU legislation could form EU public policy, since under the principle of proportionality EU legislation should necessarily advance interests protected in the EU Treaties.[217]

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[215] In both *Mostaza Claro* and *Asturcom* the question was about the public policy status of directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, a piece of secondary EU legislation. In 2002 before *Mostaza Claro* and *Asturcom*, Ojanen had argued that only primary EU law¸ *i.e.* EU Treaties, their amendments, annexes and treaties of accession could constitute public policy rules, and that secondary EU law outside these sources of law could not form a part of EU public policy. Ojanen even concluded that most probably the public policy nature could only be attributed to such primary EU legislation that is directly horizontally applicable. See Ojanen 2002, pp. 69–71 and Ovaska 2007, p. 45 concurring with Ojanen. With *Mostaza Claro* and *Asturcom*, these interpretations have proved wrong.

[216] Article 3 of the then European Community Treaty does not have an exact corollary in the TEU, but some of its elements have been included in the current Article 3(2) TEU.

[217] Bermann 2012, p. 417. On principle of proportionality, see Article 5 TEU. It should be noted, however, that the principle of proportionality requires the measures of EU law to be "only" *necessary* whereas *Eco Swiss, Mostaza Claro* and *Asturcom* set the threshold for public policy status at *essential* rules. Further, it could be rightly questioned whether all EU legislation in reality is truly necessary, as required by the principle of proportionality. Be that as it may, the argumentation adopted in *Mostaza Claro* sets the threshold of EU public policy notably low.

Nonetheless, CJEU did not in *Eco Swiss*, *Mostaza Claro* or *Asturcom* state that all EU law, or even any specific fields of law, would as such constitute public policy. In some non-arbitration related judicial proceedings, the CJEU has in fact denied the public policy nature of certain provisions of EU law.[218] However, compared to the traditional arbitral and national conceptions of public policy, the notion adopted by the CJEU appears to be a broad one. Whereas the public policy exception in international arbitration and in enforcing courts typically covers only the most flagrant cases, EU public policy under the CJEU's practice seems to entail a number of different provisions only waiting to be identified as public policy rules. For example, the competition law provisions protected by EU public policies would most likely not be protected by mere national public policies.[219] It has been suggested, quite rightly so, that EU public policy seems largely to serve a purpose of *emphasizing the paramountcy of EU law vis-à-vis the law of the Member States*.[220]

National courts seem also willing to enforce the broad categories of public policy, as set out by the CJEU. In a 2013 Court of Appeal ruling[221], the Helsinki Court of Appeal denied recognition of a Latvian arbitral award rendered against a Finnish consumer based on the public policy status of an EU directive and the argumentation adopted in *Asturcom*. The Court of Appeal concluded that based on *Asturcom*, the notion of Finnish public policy must also include the consumer protection rules set out in the relevant EU directive.

3.5.2 EU public policy and trade sanctions

The fact that EU public policy appears to cover such broad categories of Union rules, raises a question whether all EU trade sanctions should also be considered as constituting a part of such public policy, should they be assessed by the CJEU. When assessing this question, particular attention should be paid to the interest protected by the trade sanctions, since the

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[218] See Joined Cases C‑222/05 to C‑225/05, Van der Weerd *et al*. v. Minister van Landbouw where provisions regarding the measures to control foot and mouth disease were not granted public policy status. However, since the notion of public policy in national courts in non-arbitration related matters and arbitral tribunals is essentially different, no far-reaching conclusions may be drawn from this practice. See chapter 1.3 above and Lew *et al.* 2003, pp. 491–492.
[219] Ovaska 2007, p. 45. Notably, also in the *Eco Swiss* case the Dutch judiciaries requesting the preliminary ruling had stated that the competition law provisions would not under Dutch law had been considered as public policy rules. See *Eco Swiss* paragraph 24.
[220] Bermann 2012, p. 419.
[221] HelHO S13/433, 14 October 2013, n:o 2705.

CJEU seems to have justified the public policy status mainly based on the protected interest and its significance for the EU and its objectives.

All EU trade sanctions are adopted based on Article 215 TFEU that allows interruption or reduction, in part or completely, of economic and financial relations with a third country where such restrictive measures are necessary to achieve the objectives of the CFSP. The Union's and its member states' security interests as such have often been considered as values that must be protected with the notion of public policy.[222] Also objectives of the CFSP, set out in Title V of the TEU[223], including *i.a.* safeguarding Union's fundamental values, supporting democracy, rule of law and human rights, encouraging the integration of all countries into the world economy as well as preserving peace, preventing conflicts and strengthening international security[224], have often been considered essential to the EU.[225] These values and principles are obviously what trade sanctions adopted by the EU aim to protect.[226]

Looking to the argumentation and the expansionist tendencies adopted by the CJEU in *Eco Swiss*, *Mostaza Claro* and *Asturcom* as well as to the primary law basis and the gravity of the public interests the EU sanctions aim to protect, it would seem possible, even likely, that the CJEU would, if faced with a preliminary ruling regarding the public policy status of EU sanctions, classify the sanctions as EU public policy. It would be easily argued that the trade sanctions were *essential to the tasks entrusted to the EU*. This could have wide repercussions for national courts, which would be obligated to give effect to such trade sanctions as EU public policies in both setting aside as well as recognition and enforcement proceedings.

Similarly, EU mandated blocking statutes could easily be argued to constitute EU public policy. They purport to serve the objectives of the EU including *contributing to the harmonious development of world trade and to the progressive abolition of restrictions on*

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[222] See Corthaut 2012, pp. 258–261 and the CJEU case law referenced therein.
[223] Consolidated version of the Treaty on European Union (2012/C 326/01) ("TEU").
[224] See most notably Article 21 TEU.
[225] Corthaut 2012, pp. 274–277.
[226] See Basic Principles on the Use of Restrictive Measures (Sanctions), 10198/1/04, setting out the general guidelines according to which the EU uses restrictive measures, *i.e.* economic sanctions. Accoring to the principles, the EU is *committed to the effective use of sanctions as an important way to maintain and restore international peace and security in accordance with the principles of the UN Charter and of our common foreign and security policy*.

international trade.[227] They are typically implemented based on articles in the EU treaties that aim to protect international trade and to protect the common market.[228] These values may similarly be held so important for the EU so that they would warrant the public policy status of the blocking statutes.

Therefore, in a given case, even if the award orders performance in contradiction with EU trade sanctions or blocking statutes, it could be possible that Finnish courts would set aside or deny recognition and enforceability of such award, based on an EU notion of public policy. It should be noted, however, that the mere fact that a rule *may* be considered public policy in a single case, does not make it applicable as public policy in all situations concerning such rule.[229] Rather, the national court ruling in a given setting aside or enforcement case, should examine if the *outcome* of the award were to be inappropriate, *against the fundamental principles of Finnish legal order*, should no public policy rule be taken into consideration. As discussed above, the award should order a specific performance blatantly in breach of sanctions before the performance of the award could be deemed to breach sanctions. However, if applying the public policy effectively protects the valid interests and is, all things considering, appropriate, the national court should be allowed to apply it. EU trade sanctions should presumptively be held to protect widely held values and interests.

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[227] Council Regulation (EC) No 2271/96 of 22 November 1996, preamble. The said regulation blocks the truly extraterritorial applicability of US sanctions against Iran and Cuba.

[228] For example the above mentioned Council Regulation 2271/96 is implemented based on Articles 73c, 113 and 235 of the Treaty Establishing the European Community (Articles 64, 207 and 352 TFEU) that aim to protect the free movement of goods and capital and the common commercial policy.

[229] See *i.a.* Koulu 2007, p. 248 and Klami – Kuisma 2000, p. 81. Internationally, see also the Court of Appeals of Paris in the *Thalès* case (SA Thalès Air Défense v. GIE Euromissile, Cour d'appel de Paris, 2005 II 10038, 18 November 2004) where the court concluded that the breach of public policy must be manifest, *effective* and specific ("*flagrante, effective et spécifique*"). Also the Article V(2)(b) New York Convention states that an award may be refused recognition and enforcement when "the *recognition or enforcement* of the award would be contrary to the public policy of that country" [emphasis here]. New York Convention thus refers to the concrete act of recognizing and enforcing and not to the contents of such law.

4 Trade sanctions as a limitation to choice of law in arbitral tribunals

4.1 Public policies in international arbitration

As will be noted below, trade sanctions may in certain cases constitute rules of public policy or foreign mandatory rules in international arbitration. The concept of public policy and mandatory rules in arbitral proceedings is, however, fundamentally different than that in setting aside and enforcement proceedings.[230] Arbitration's essentially contractual and international, some could even say transnational character, causes the notions of public policy and mandatory rules in arbitral proceedings to take a different form; to emphasize more the principle of party autonomy and the consensual nature of arbitration and to take a step away from the notion of public policy in national judiciaries that purports to serve essentially national interests. Unlike a national judge that may merely depend upon its own national notion of public policy to decide whether to give effect to a rule, the arbitrator must strike a delicate balance between the parties' will on the one hand and the national interests of possibly multiple sovereign states on the other.

The general rule and the starting point in international arbitration has however typically been the parties' power to decide on virtually all matters concerning the procedure of their dispute before the arbitral tribunal, including the choice of applicable law.[231] As Pierre Lalive put it in a 1971 award:

> *"There are few principles more universally admitted in private international law than that referred to by the standard terms of the 'proper law of the contract'— according to which the law governing the contract, is that which has been chosen*

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[230] See *i.a.* Swiss Federal Court decisions BGE 132 III 389 p. 399 and BGE 120 II 155 where the existence of a difference between the two types of public policy is explicitly stated. In both judgments the Federal Court deemed that the notion of public policy in enforcement proceedings should be an *attenuated* one, narrower than that applied by the arbitrator. As was discussed above, however, the Swiss conception of public policy does not correspond to that of *i.a.* EU judiciaries and far-reaching conclusions should not be drawn from Swiss practice.

[231] The freedom of parties' to choose the law applicable to their dispute is recognized in virtually all national legislations as well as in the rules of basically all arbitration institutions. See *i.a.* Section 31(2) FAA; Article 28(1) UNCITRAL Model Law; Article 28 FAI Rules; Article 22 SCC Rules. The SAA does not explicitly recognize the right but it has been considered a founding principle in the law and the upcoming review of the SAA may change the situation, see SOU 2015:37, p. 92.

by the parties, whether expressly or (with certain differences or variations according to the various systems) tacitly."[232]

Applying public policy rules, *e.g.* trade sanctions, other than those in the applicable law chosen by the parties, is a clear limitation to this main principle of proper law of the contract. If a trade sanction is a part of the law-proper of the contract and the parties have not explicitly excluded its application, the arbitrator should, as a general rule, apply the sanction. The parties' autonomy in the choice of law should be respected. Also, as a general rule, the arbitrator should refrain from giving effect to any and all trade sanctions, or other public policy rules, that do not form a part of the proper law of the contract as this would not be in line with the main principle of party autonomy. As the US Supreme Court stated in the well-known *Mitsubishi* case: "*the international arbitral tribunal owes no prior allegiance to the legal norms of particular states*"[233]. The only prior allegiance should be to the will of the parties. An arbitrator, unlike national judges, does not have a forum that would impose some strict limitations to the choice of substantive law by the parties and for an arbitrator, each law outside the *lex causae* is on an equal footing and may be taken into consideration only to a limited extent.[234]

Only following the will of the parties does not, however, observe the existence of state, public and third party interests. Mandatory rules, such as trade sanctions, exist for a reason, and may legitimately work to prevent unwanted behavior by other states or private individuals. The question again is how to balance the autonomy of the parties with these interests. This issue becomes even more complicated when the mandatory rules claiming applicability are part of a law foreign to the contract. How should such foreign public policies be considered by the arbitrator?

Two separate, yet largely overlapping main schools of thought have tried to bring clarity to the above question. The first, the theory of *transnational public policy*, depends more heavily on the parties' autonomy, and emphasizes that only if the award were to run counter to widely recognized morals and values should the parties' autonomy be interfered with. Arbitration is

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[232] ICC Award 1512.
[233] United States Supreme Court in 473 U.S. 614 (1985), (Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc), 02.07.1985.
[234] See *i.a.* Goldman 1963, p. 443. See also Derains 1987 pp. *231–232;* Lalive 1987, pp. 271–272.

considered a de-nationalized means of resolving disputes and the decision to give or not to give effect to foreign mandatory rules is based on the *moral value* that a specific rule carries, brought into comparison with the widely held values of the international community. The second theory, that of *foreign mandatory rules*, on the other hand, emphasizes the legislator's intention and the national legislation, the closeness of connection between the rule and the dispute, the consequence of application or non-application as well as the legitimacy of the claim of the foreign mandatory rule. Following this school of thought, the arbitrators are indeed empowered, and maybe even under a duty to truly apply the rules of foreign law, and not only consider them based on the moral values they carry.[235]

The theories do, however, also overlap, and arbitrators are not bound to consider the issues of public policy through only one of the theories. However, some authors tend to limit themselves to the transnational public policy method, sometimes by extending the notion of what constitutes truly international, transnational public policy, to a relatively great extent. Others take foreign mandatory rules into account as such, yet still, when assessing whether or not to consider them, place much significance on the moral value the foreign mandatory rule carries. In this way, the demarcation between the two theories not as clear as it first may seem.

The presentation below is divided so that the method of *transnational public policy* will be discussed first. The method relies on transnationally held conceptions of morality, an equivalent of the notion of public policy in national courts, as discussed above. The method is best employed in the context of certain multilateral sanctions and in a certain cases where the arbitrator wishes to refuse application of certain unilateral trade sanctions in the *lex causae*. After considering the transnational public policy method, it is discussed whether arbitrators should at all consider mandatory rules of other states as legal rules, or rather use the tools such as the notion of *force majeure* in the *lex causae* to determine the applicability of foreign rules. This preliminary question will have to be answered in order to determine whether trade sanctions may in the first place be asses through the *foreign mandatory rules* method. In relation to foreign mandatory rules, it is first examined whether arbitrators entitled or whether they must apply mandatory rules other than those in the *lex causae*. Then,

[235] Gaillard – Savage 1999, pp. 851–852.

this study discusses the effect of the notion of public policy of the places of arbitration and enforcement judiciaries, as discussed above in chapter 3. The final subchapter then discusses a general method for exercising discretion over the application of foreign mandatory rules and trade sanctions in particular, the *special connection method*.[236]

First, however, few preliminary remarks regarding the trade sanctions in the law chosen by the parties, the *lex causae*. How should they be considered within the framework of choice of law issues?

4.2 Trade sanctions in *lex causae*

As a general rule, the law chosen by the parties should be respected and applied as a whole, including all its mandatory rules.[237] It could be asked, however, how the trade sanctions or any other mandatory rules that have come into force only after the conclusion of the parties' contract, *i.e.* subsequent trade sanctions, should be treated. Should the sanction nevertheless be applied just as any other mandatory rule in that law, despite the fact that the parties cannot be considered to have chosen to apply the trade sanctions imposed only after the conclusion of their contract?

Generally, the answer has been negative, since the applicability of the sanctions has not been within the legitimate expectations of the parties and the parties cannot be deemed to have chosen the subsequently imposed sanction to apply.[238] The issue is, however, essentially a question of interpreting the choice of law provision by the parties and the answer hence

[236] Here, a meticulous reader is able to observe a dichotomy corresponding to the different schools or conceptions of the origin of arbitration discussed in chapter 1.3 above. The transnational public policy method (chapter 4.3) obviously puts more value on the autonomous base of arbitration's nature, since it explicitly distances itself from national laws and their conceptions of public policy and creates an alternative body of public policy, the *transnational public policy*. The *foreign mandatory rules method* (chapter 4.5) on the other hand emphasizes the jurisdictional nature of arbitration where the arbitrator should also ensure the compliance with states' interests. The strict application of *lex causae*, as well demonstrated by the method of indirect application (chapter 4.4) finally may be seen as a display of the *contractualist* school of thought.

[237] Born 2014, p. 2707; Burdeau 2003, p. 770 and Derains 1986, pp. 244–245. Some have, however, suggested that the mandatory rules of *lex causae* should face the same scrutiny as all other mandatory rules since that way the public policies of that state would gain unwarranted precedence over other the public policies of other states. See Voser 1996, pp. 339–340. Most, however, seem to agree that by choosing the applicable law to their contract, the parties agree that all of its mandatory provisions may also come to apply. See the discussion and criticism of Voser's views in Barraclough – Waincymer 2005, pp. 219–222.

[238] Azeredo da Silveira 2014, p. 109–110. On determining the legitimate expectations of the parties, see Derains 1986.

depends on the particulars of each case.[239] In many instances it may nonetheless be argued that the trade sanction in the applicable law must be assimilated to foreign trade sanctions to the extent the sanction has been promulgated after the conclusion of the contract between the parties since it was not the will of the parties' to have such sanction applied. As Azeredo da Silveira put it:

> *This position is justifiable considering that had the parties known that the applicable law would encompass provisions serving public interests, they might have selected another law, in which case the said provisions could only have been given effect had they satisfied the conditions that must be met by an overriding mandatory rule that is external to the applicable law.*[240]

Therefore, given that the interpretation of the choice of law by parties that allows, the general presupposition should be that the subsequent trade sanctions in the law applicable to the parties' contract must be treated like the mandatory rules of other countries. Their applicability is therefore determined by means of the same standards, described below and only if those standards are met, can the trade sanction be considered a part of the applicable law. In most cases, however, trade sanctions will be considered through the concept of *force majeure*, or alike in the applicable law.[241] Hence, the divide between the two views, one promoting the automatic application of mandatory rules of *lex causae* and the other requiring them to observe the same prerequisites as mandatory rules of other countries, is not as steep as it first seems. Nonetheless, what is below said about foreign mandatory rules, will also have to be extended to the mandatory rules of the *lex causae.*

4.3 Transnational public policy

4.3.1 Definitions and preliminary remarks

In the judicial system of private international law, *i.e.* in international disputes heard before national courts, the applicable law typically provides a public policy provision to ensure compliance of the judgment with the most essential rules of the forum.[242] Since arbitration

[239] Born 2014, p. 2708.
[240] Azeredo da Silveira 2014, p. 81.
[241] See chapter 4.4 below.
[242] See *i.a.* Article 21 Rome I Regulation.

strictly speaking has no forum or *lex fori*, the compatibility assessment with any state's public policies as such does not come into question. To ensure compliance with certain principles of morality and justice, arbitral literature and case law has come up with a notion of *transnational public policy* that may be used to reject outcomes that are not in line with fundamental moral or ethical principles.

Transnational, or truly international public policy,[243] is a limited category of public policy applied in international arbitration that reflects the transnationally held conceptions of justice and principles of law. A notion very similar to that of transnational public policy has, at least implicitly, been referred to in judicial practice as early as in the 1940's[244] but the notion was best fostered and brought to common knowledge by Pierre Lalive in his 1986 article "*Ordre Public Transnational (ou Réellement International) Et Arbitrage International*" and and has since earned almost unanimous acceptance with practitioners.[245] Even if the existence of such a category of public policy is not disputed, the scope and contents of transnational public policy are very much debated.

Early descriptions have characterized transnational public policy as a "*general principle of law recognized by civilized nations that contracts which seriously violate bonos mores or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators"*.[246] The ILA Interim Report describes transnational public policy as "*representing an international consensus as to universal standards and accepted norms of conduct that must always apply"* and comprising "*fundamental rules of natural law, principles of universal justice, jus cogens in public international law, and the general principles of morality accepted by what are referred to as "civilised nations*".[247] One author has referred to it as the *lowest common denominator of all legal systems of the world.*[248] Transnational public policy is hence not the public policy of any state in particular but rather public policy that transcends state boundaries and reflects universal or at least very

[243] Also simply known as *international public policy* (*e.g.* Born 2014, pp. 2117–2119) or in French as *ordre public réellement/veritablement international* (*e.g.* Goldman 1963, p. 432).
[244] For the judicial basis and history of the notion of transnational public policy in international arbitration, see Lalive 1987, pp. 187–200.
[245] Blessing 1999, p. 62 and Matray 1997, p. 86.
[246] ICC Award 1110 p. 10.
[247] ILA Interim Report, pp. 2–3 and 7.
[248] Hobér 2011, p. 57.

widely accepted values and morals.[249] Like the national conception of public policy, the notion of transnational public policy escapes any fixed definition by its nature; it is constantly evolving and developing with the evolution of international trade and its contents are determined on a case-by-case basis.[250] Blessing has described the innate difficulty of determining the contents of transnational public policy as follows:

> *"One is somehow tempted to say that this phenomenon is somehow akin to the difficulty to define an elephant: You may say that an elephant is grey and big, and yet, this definition is neither helpful nor informative. But, nevertheless, when you see an elephant, you can immediately recognize it as such."*[251]

It is indeed tempting to pass over the trouble of defining the elephant this way. Leaving the definition and application of a notion as intrusive as transnational public policy only to the hands of the arbitrators, however, risks the interpretation to lead to the application of *artifacted policy created by the arbitrators for that particular case*[252]. Some criteria should hence be applied to reveal the contents of the notion.

Legal literature has painted some kind of consensus on the fact that at least prohibitions of corruption, smuggling, drug traffic, and the export of goods belonging to the cultural heritage would constitute transnational public policy.[253] Procedural principles such as fair hearing and due process have also been said to form a part of this set of transnational moral values.[254] The transnational public policy should not, however, be conceived as a set list of rules, but rather as a method, aimed at ousting morally insupportable outcomes in arbitration proceedings. The method should not be based on the intuition of the arbitrator in, but rather on some more or less objective criteria. As will be noted below, the criteria may quite often

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[249] Pryles 2007, p. 3. Requiring a comprehensive, totally universal adoption of certain policies for them to constitute transnational public policy is of course not reasonable, as certain rogue states do not recognize even some very fundamental values and morals.
[250] Marchand 2012, p. 101 and Brunner 2008, p. 275.
[251] Blessing 1999, p. 62. See also Lazareff 1995, p. 141, stating that experienced arbitrators immediately know when transnational public policy is in play.
[252] Reisman 2007, p. 850.
[253] ILA Interim Report p. 7; von Hoffmann 1997, p. 23 and Lalive 1987, pp. 258–318.
[254] Barraclough – Waincymer 2005, p. 218.

be derived from *states' international obligations*, i.e. public international law.[255] The suggested method and the relevant criteria are presented below.

4.3.2 Application-worthiness test

Determining when a public policy is so commanding that it becomes truly international, or transnational, able to oust the parties' choice of law, including national public policies, is a persistent dilemma that cannot be answered unambiguously. The dilemma may be disentangled, or at least better dismantled, by means of the so called *application-worthiness test*: by examining the public policy's *financial or socio-economic goals and underlying policies, examined under a functional analysis*.[256] This method of exercising discretion over transnational public policy rules has traditionally been used in relation to the special connection method, discussed below, but may equally well be used to assess the transnational public policy rules.[257] At least three matters should be considered in determining the application-worthiness of a given rule: The first one is the so-called *shared-values-test*, determining whether the protected value is of essential character and reflecting fundamental principles of transnational public policy. Secondly, the wide applicability of the rule, proving that the rule truly is transnationally shared, could serve as an indicator of the application-worthiness of the contemplated transnational public policy rule. Finally, one should consider whether the outcome of applying such public policy is, all things considering, appropriate.

The application-worthiness test and its first branch, the shared-values test, is effectively an examination of the underlying purposes and goals of the trade sanction or some other mandatory rule. For this purpose, the rules of *public international law* offer an excellent yardstick and most notably a set of tools for avoiding a situation where the arbitrator would have to resort to mere personal moral assessment of the facts.[258] The supra-national nature of the notion of transnational public policy requires it to be based on the opinion of the

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[255] See Gaillard – Savage 1999, p. 853.
[256] Blessing 1999, p. 64; Brunner 2008, p. 274 and Grigera Naón 2001, p. 320. Blessing also lists six other criteria for the applicability of transnational public policy rules. Most of the criteria listed by Blessing are nonetheless poorly applicable to the issues of *transnational public policy* and should rather be used for assessing the national mandatory rules that may become applicable in arbitral proceedings.
[257] Waincymer 2009, p. 36. on foreign mandatory rules method, see chapter 4.5.4 below.
[258] Lalive 1987, pp. 284–286 and Grigera Naón 2001, pp. 322–323.

collective of nations, and since public international law inarguably has a notable role in defining the opinions of the collective of nations, it should indeed be given weight in the assessment. Widely accepted treaties and conventions could form a solid starting point for assessing the acceptability of certain public policies.[259]

The position of public international law, the law of nations, as a source for rules of transnational public policy is virtually undisputed in literature.[260] Some have even gone as far as stating that transnational public policy could form a part of public international law, and not *vice versa*.[261] However, since rules of public international law are not unambiguous and often contradict with each other, single rules of international law may rarely as such be used to legitimize the transnational public policy status of a mandatory rule or a fundamental principle. Public international law, however, provides also the tools for balancing the differing interests when contemplating the transnational public policy status of a given trade sanction or other rule or principle of law. Besides public international law, arbitral and court practice may provide tools for finding and measuring those values that have been deemed as fundamentally important in the practice of international commerce.[262]

The direct applicability of rules of public international law has also raised some questions.[263] Public international law by definition concerns states and their interests, and as a general rule, is not intended to directly influence the relationships between private individuals.[264] Extending its effect to relationships between private individuals is an exception to this main rule. It has, however, been widely accepted that public international law and especially UNSC multilateral sanctions, instruments of public international law in themselves, may affect the contents of transnational public policy as well as the national public policies of

[259] Marchand 2012, p. 188.
[260] Lalive 1987, pp. 307–308; Marchand 2012, pp. 98–99 and Racine 2004, p. 105. See also the ILA Recommendations, that lists "*states' international obligations*" as one category of public policy.
[261] Von Hoffmann 1997, p. 23.
[262] Lalive 1987, pp. 286–290.
[263] Matray 1997, p. 73.
[264] See *i.a.* Burdeau 2003, p. 773 and the referenced, unpublished Partial Award no. 2 of 11 March 2000, where the arbitral tribunal concluded that it is beyond doubt that the UNSC Resolutions lack direct applicability in arbitral disputes.

states.[265] The rules of public international law are thus not directly applied, but rather used as a yardstick to measure what constitutes internationally held morals and values.

The second branch of determining whether a rule is applicable as transnational public policy is defining when a rule is sufficiently universally accepted. The mere fact that a certain legislative solution has been adopted by a large number of states does not in itself make it transnational public policy. It is generally held that states should be left with the possibility to adopt their own legislative solutions as long as they are not expressly against principles of public international law.[266] Therefore, merely following a certain legislative solution because it has been adopted by number of countries does not seem tenable. However, wide acceptance should be an imperative precondition for a certain rule to constitute transnational public policy.[267]This further underlines the fact that widely accepted and ratified treaties should form a solid starting point for unveiling the contents of transnational public policy.

Finally, the application of transnational public policy rules should lead to an appropriate result that is acceptable and truly protects the interests it aims. Therefore, if applying a trade sanction as a rule of transnational public policy would not prevent the performance of the contract and if applying it would cause a disproportionate risk of penal or financial sanctions, such as losses of export licenses, the application of such trade sanction cannot be deemed appropriate.[268]

4.3.3 Multilateral trade sanctions

Multilateral trade sanctions, issued by UNSC Resolutions serve as a prime example on how rules of public international law may affect the contents of transnational public policy. Multilateral sanctions' position as rules of transnational public policy enjoys virtually

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[265] Regarding national public policies, see ILA Recommendations p. 3 stating that *states' international obligations* may form a part of its public policy. As regards transnational public policy, see Grelon – Gudin 1991, p. 639 and 642; Burdeau 2001 p. 268, and Cissé 2004, p. 702. See also Burdeau 2003, pp. 775–776, asserting that the arbitral tribunal indeed applied a multilateral trade sanction as transnational public policy in unpublished Partial Award no. 2 of 11 March 2000.
[266] Grigera Naón 2001, p. 360. See also the Lotus Case (1927) PCIJ Ser. A No 10 in the Permanent Court of International Justice, the Judicial Branch of League of Nations (the predecessor of the UN), where the court concluded that a state should be allowed to enforce such rules it deems appropriate, unless prohibited by rules of international law. See also Lowenfeld 2002, p. 741.
[267] Barraclough – Waincymer 2005, p. 219.
[268] Azeredo da Silveira 2014, p. 162.

universal acceptance among practitioners because of the fact that they are quasi-universally accepted within the international community, and they as such form a part of the law of nations.[269] Resolutions of the UNSC will have to, by their nature as unanimous decisions of the international community, reflect the values of the international community. Hence it is very widely accepted that that UNSC trade sanction may be applied as a matter of transnational public policy despite a contrary choice of law by the parties, even if the country of *lex causae* has not implemented the sanction in question into their national legislation.[270] Therefore, multilateral trade sanctions have typically been regarded as forming a part of the positive transnational public policy, directly applicable in the parties' dispute, even if not part of the applicable law.[271]

However, even multilateral sanctions issued by the UNSC have been subjected to a review by national, or in this case EU courts. In the well-known *Kadi* rulings, the CJEU deemed that it was empowered to review the lawfulness of the EU implementing measures of UNSC sanction resolutions with regard to certain fundamental values shared by the UN and the EU.[272] Although an arbitral tribunal should not as a general rule be empowered to review UNSC decisions, the above serves to demonstrate that even the most widely accepted norms may not be taken as *absolute* norms of public international law and transnational public policy.[273] Therefore again, transnational public policy may not be conceived as a static list of norms, supported by law of nations. Rather, the contents of transnational public policy are

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[269] Gaillard – Savage 1999, p. 853.
[270] Geisinger *et al.* 2012, p. 424; von Hoffman 1997, p. 23 and Kessedjian 2007, p. 861. See also Grigera Naón 2001, p. 323 and the referred unpublished ICC Award 7472.
[271] Cortese 2004, p. 742, and Burdeau 2003, p. 761 referring to an unpublished interim award where a trade sanction was taken into account as a transnational public policy rule.
[272] Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities and Case T-85/09 Yassin Abdullah Kadi v European Commission. Previously, the European Union General Court even asserted that it would be empowered to review UNSC sanctions with regard to *jus cogens* and further implied that right of property might have such *jus cogens* status. See Case T-315/01, Yassin Abdullah Kadi v. Council and Commission, 21 September 2005 and Farrall 2007, p. 72. The ruling was however overturned in the CJEU (see *Kadi I ibid*). *Jus cogens*, referred to by the European Union Genereal Court, are normative principles that are considered to be so important for the welfare and survival of the global community that they cannot be derogated from even through the application of otherwise applicable sources of international law, conventions or customary law, and only another peremptory norms may limit their applicability. On peremptory norms, see Article 53 Vienna Convention and Orakhelashvili 2005, p. 60 and on *jus cogens* review of UNSC sanction, Cortese 2004, pp. 748–750.
[273] See also the material criticism on certain UNSC trade sanctions, Grelon – Gudin 1991, p. 662 and Matray 1997, pp. 73–74. The fact that certain UNSC sanctions claim to affect also the natural and legal persons within the sanctioned state and not only the state itself is said to unfairly discriminate Iraqi nationals and residents.

better uncovered through the described *method* of transnational public policy used to determine whether the transnational public policy has a valid claim to oust the national rules. This happens through the *application worthiness test:* by assessing the relative weight between the values and limitation to rights underlying behind the conflicting norms and finally by choosing the result that best balances the interests.

Multilateral sanctions presumptively serve universally held interests and the UNSC must be considered to have weighed the interests and deemed that the interest protected by the sanction is so essential that it should prevail over the will of the parties and the protection of their property. The above also serves to prove that the issues of transnational public policy and their collision with national public policies are fundamentally questions of morality and personal values. For the assessment of morality, public international law provides at least a seemingly objective benchmark.

4.3.4 Unilateral trade sanctions

It could be asked to what extent could the question of other types of trade sanctions, *i.e.* unilateral trade sanctions, also be considered through the prism of transnational public policies and the application-worthiness test. The UNSC Resolutions imposing trade sanctions are an exceptional case since they constitute rules of international law in themselves, imposing themselves over the parties as transnational public policy rules. Unilateral sanctions, issued autonomously by states or supranational entities such as the EU, do not as a general rule qualify as rules of transnational public policy since they do not presumptively constitute rules of public international law or otherwise reflect the fundamental principles of laws of "civilized nations". One could however pose a question whether a unilateral sanction that would not originate from the UN but that would nonetheless be accepted and shared by a vast majority of nations could constitute transnational public policy. Although possible, such scenario seems unlikely. Some writers assert that ules of transnational public policy may in exceptional circumstances be used to further the national public policies of one state over another.[274] One could for example imagine a situation where a permanent member of the UNSC would be subjected to almost

[274] Lalive 1987, p. 312.

universally accepted unilateral sanctions. Permanent members of the UNSC enjoy a veto power over all UNSC Resolutions, and thus may veto multilateral trade sanctions aimed against them.[275] In such situation, the UNGA could also pass recommendations to issue sanctions against this country, condemning its actions and even recommending the issuance of sanctions.[276] Even if this were the case, the threshold for degree of universality and acceptance among member states would in every case have to be set very high and the condemnation for the actions that lead to the sanctions would have to be virtually universal.[277] Arbitrators should remain impartial over the parties and their countries of origin and in every case avoid politicizing the questions they are ruling on. Deeming a trade sanction to constitute transnational public policy on overtly lenient grounds would easily constitute a breach of the arbitrators' impartiality. [278]

Voser has discussed this type of rules under the denomination of *universally recognized legally protected interests*. According to Voser these interests are somewhat of a corollary to transnational public policy, yet lacking transnational public policy status as such and thus discussed in relation to the special connection method, discussed below. The category includes certain interests that are shared universally, whose existence may be indicated by similar laws implemented in other states.[279] If a unilateral trade sanction were shared by a large number of states, and implemented because of a valid cause, say promotion of peace or human rights, one could be tempted to conclude that this type of sanction could constitute

[275] See Article 27 UNC.
[276] See *i.a.* UNGA Resolutions A/RES/41/35 and A/RES/42/23 where the UNGA recommended and urged UN member states to impose trade sanctions against South Africa based on its apartheid policies.
[277] The discussed situation may be read as a reference to trade sanctions against Russia imposed from 2014 onwards. One could with relative certainty conclude that the trade sanctions adopted by the EU, USA and mostly some other developed countries (*e.g.* Canada, Norway, Ukraine, Switzerland, Australia, New Zealand, Japan) would not be considered as transnational public policy by an arbitrator since a large majority of states has refrained from imposing such sanctions. Also the UN General Assembly resolution condemning Russian annexation of Crimea (merely condemning the annexation, and not discussing the issue of trade sanctions) was approved only by a small majority of 100 countries out of 193. See A/RES/68/262. Hence, given the duty of the arbitrator to remain impartial before the parties, one would most likely conclude that the sanctions do not as such constitute transnational public policy. The assessment of the sanctions under the special connection test, discussed below in chapter 4.5.4, could, however, be different, since the requirement for universal acceptance must in such cases be deemed to constitute a lower threshold.
[278] Arbitrator's impartiality is widely held to be one of the founding values of international arbitration. See *i.a.* Section 9(1) FAA; Section 8(1) SAA; Article 11(1) ICC Rules; Article 5.3 LCIA Rules; Article 20 FAI Rules *etc*.
[279] The Giuliano – Lagarde Report, discussed in more detail in relation to the special connection test in chapter 4.5.4, promotes similar views and suggests that laws existing in other countries or which serve a generally recognized interest should emphasize the application-worthiness of the provision.

such universally recognized interest that could be taken into account as a foreign mandatory rule. Given the absence of a UNSC Resolution the threshold for considering a unilateral sanction transnational public policy would, however, in every case have to be set extremely high.

Transnational public policy may nonetheless have an effect in cases where the arbitral tribunal contemplates whether to *refuse application* of a unilateral trade sanction, applicable under the *lex causae*. This could be the case when the unilateral sanctions would contravene with transnational public policies, being in conflict with certain universal conceptions of morality. A clash between a unilateral trade sanction, *a domestic public policy* on one hand and transnational public policy on the other will as a general rule have to be resolved in the favor of the latter.[280]

The transnational public policy as such has indeed a negative effect as well as a positive one and it may be used to supersede provisions of law that are in contradiction with it and public international law.[281] Some early commentators and treaties have even held that *all* unilateral measures taken for the purposes of foreign policy or national security would always be contrary to the rules of public international law, since they would run counter to the principle of non-intervention as set out in Article 2(3) UNC. If one were to strictly follow this line of interpretation, all unilateral trade sanctions should be disregarded by the arbitrator on a transnational public policy basis. The current prevailing view however is, that no clear rule of customary international law exists prohibiting the use of unilateral trade sanctions exists.[282] The International Court of Justice, the primary judicial branch of the UN, has in fact specifically stated that unilateral economic measures do not as such breach international law.[283] It therefore seems clear that transnational public policy cannot be used to supersede all cases where unilateral trade sanctions could become applicable.

It has been nonetheless argued that transnational public policy could be used to supersede a unilateral trade sanction in the *lex causae* if the sanction is *i.a.* racially or religiously

[280] Lalive 1987, p. 312 and Marchand 2012, pp. 188–189.
[281] Lalive 1987, p. 312.
[282] Lowenfeld 2002, p. 732
[283] International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua*,, paragraph 245.

discriminating.[284] Here, the general principles of non-discrimination, as they are embodied in international treaties and human rights conventions, as well as a universal principle of morality and comity between nations, could be used to oppose the application of discriminatory sanctions. In this way, the arbitrator should assess in which way the application or non-application would affect the third party rights by means of unjustified discrimination, and then balance the limitation on third-party rights with the effect the legitimate expectations of the parties to have their dispute resolved predictable in accordance with the *lex causae*.[285] The difficulty, however, lies in distinguishing such racist embargo from a purely political one.[286] For example some human rights conventions prohibit discrimination based on nationality. Should all such trade sanctions and boycotts that are based on nationality be considered contrary to transnational public policy based on the fact that they discriminate people based on a personal reason such as nationality? Such solution seems untenable. In *Götaverken*, the arbitral tribunal implicitly concluded that the contractual requirement to respect the nationality based boycott laws against Israel and to provide a certificate that no parts of the provided goods were of Israeli origin was not as such against principles of transnational public policy.[287] Indeed, misinterpreting a political trade sanction for a racist one would make the arbitrator to take a stand on the political rather than legal or even ethical issues. Despite these difficulties, the arbitrator should pay special attention when assessing the applicability of racially or religiously motivated sanctions, as not to feed morally insupportable activities, which as a general rule are against the principles of transnational public policy.

It has further been asserted that the freedom of trade and principle of non-intervention, as protected in the international treaties and human rights conventions, could constitute such

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[284] Barraclough – Waincymer 2005, p. 234; Grigera Naón 2001, p. 323 and Marchand 2012, p. 186. See also the *Regazzoni* case (Regazzoni v. K. C. Sethia [1958] AC 301, 21 October 1957) the facts of which are as follows: an English company was exporting jute bags from India to South Africa under an English law agreement when India imposed export restrictions to South Africa as a retaliatory measure for the apartheid policies of South Africa. The non-acceptability of apartheid measures and the fundamental principle of non-discrimination were indirectly taken into account when deciding on the applicability of the Indian law, a foreign mandatory rule. On the analysis of the *Regazzoni* case and transnational public policies, see Lalive 1987, pp. 279–280.

[285] Waincymer 2009 pp. 32–33.

[286] Matray 1997, p. 86 and Moitry 1991, p. 363–365.

[287] ICC Awards 2977, 2978 and 3033. See also ICC Award 1782 where a racially motivated ban to use staff of Israeli origin neither did constitute a *force majeure* excuse nor was so discriminatory and thus inappropriate as to be disregarded on a transnational public basis.

fundamental principle of public international law and transnational public policy that could justify the non-application of certain unilateral trade sanctions.[288] Besides the principle of non-intervention of the UNC discussed above, *i.a.* the Article 2(1) UNC on the sovereignty all nations, Article XI GATT[289] on the elimination of quantitative restrictions or the principles of non-discrimination as embodied in numerous human rights conventions[290] could be used to prove that a trade sanction would be contrary to the rules of public international law and thus transnational public policy.[291] The trade sanctions restricting trade and breaching above rules of international law are nonetheless not *as such* contrary to transnational public policy, solely based on the existence of the said rules of international law.[292] In fact, the public international law arguments may also feed the counter-arguments in favor of the application of the unilateral trade sanction: Articles XXI(b)–(c) GATT provide for an exception that in certain cases allows derogation from the rules of elimination of quantitative restrictions[293] and human rights may legitimately be restricted or balanced against other human rights.

A special case in the transnational public policy assessment of unilateral trade sanctions, and a corollary with the case of UNSC multilateral sanctions, is a situation where the UNGA has explicitly condemned a unilateral sanction.[294] In these cases the unilateral sanction in the

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[288] Racine 2004, pp. 104–105 and Marchand 2012, p. 187.
[289] General Agreement on Tariffs and Trade. The first section of the article reads as follows: "*1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party*".
[290] See *i.a.* Article 14 [European] Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 26 International Covenant on Civil and Political Rights.
[291]Azeredo da Silveira 2014, p. 156–161 and Marchand 2012, p. 188.
[292] Racine 2004, p. 105.
[293] Article XXI GATT provides that:
"*Nothing in this Agreement shall be construed […]*
(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
(i) relating to fissionable materials or the materials from which they are derived;
(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
(iii) taken in time of war or other emergency in international relations; or
(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security".
GATT is a trade agreement that governs the trade relations of over 150 member states of the World Trade Organization ("WTO").
[294] Azeredo da Silveira 2014, pp. 154–155 and *i.a.* the UNGA Resolution A/47/19 of 24 November 1992 on ending the embargo measures by the USA against Cuba that condemned certain embargo measures by the USA

applicable law should presumptively be non-legitimate and against the transnational public policy, in a way similar to the fact that multilateral sanctions presumptively form transnational public policy. Like in the case of multilateral sanction, in cases relating to the non-applicability of unilateral sanction, the presumption may in principle also be overturned.

In every case, however, following the application-worthiness test described above, the arbitrator will also have to consider whether the value protected by the transnational public policy that is used to oust the rule in the otherwise applicable law is sufficiently widely shared. If after balancing the interests and after ascertaining that the rule is universally shared, the protected interest appears legitimate and sufficiently widely shared, the arbitrator must further consider whether the result, all things considering, is appropriate and satisfactory. For example, the arbitrator must consider whether the possible non-application of a sanction would lead to enforceability problems, and further, consider how the result would affect the contractual balance and estimate whether changes in the contractual balance are justified.[295] If the non-application of a sanction in *lex causae* alters the contractual balance in a fundamental manner that does not seem justified considering the gravity of the protected third party interests, the arbitrator should apply the unilateral sanction.[296] Just as was the case of the public policy control at the stage of setting aside and enforcement, here too the transnational public policy analysis should happen on the level of *outcomes*. If the outcome of applying a sanction in the *lex causae* would breach principles of public international law or transnational public policy, only then should the application be denied. In most cases concerning unilateral trade sanctions of the *lex causae*, it is hard to visualize such negative externalities that would justify deviating from the parties will.[297] The arbitrator is often unable to render an award that would evade the negative third party effects, since in many cases the performance of the contract has become impossible regardless whether the

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against Cuba. The UNGA has since every year condemned the US embargo against Cuba. In the latest vote on resolution in 2014 (UNGA Resolution A/RES/69/98), 188 states voted in favor of the condemning, 2 (US and Israel) against and 3 (Palau, Micronesia and Marshall Islands) abstained from the vote. This universal condemnation could suggest that non-application of US sanctions against Cuba may constitute transnational public policy. In this manner, if for example two non-US parties had decided to apply US laws in their contract, it could be concluded that it were transnational public policy to exclude the application of these sanctions.

[295] Azeredo da Silveira 2014, pp. 159–160.

[296] Waincymer 2009, p. 33.

[297] See for example ICC Awards referred to in footnote 287 above, where the mere fact that a racially motivated ban was in place did not justify the non-performance by defendant, let alone the nullity of the contract, likely because the negative externalities could not in no case have been evaded-

rule constituting the public policy rule is applied as transnational public policy or not. If the externalities, such as limitations of free trade or discriminating on an inappropriate basis cannot be evaded, it is better to obey the parties' will and render an award that is in accordance with the applicable law and thus the parties' expectations.

Having concluded this brief analysis of transnational public policies, a follow-up question that is tightly linked with the theory of transnational public policies must be asked. It regards the manner in which public policy issues are considered in arbitral tribunals. The issue whether trade sanctions should be applied as foreign mandatory rules, or alternatively only taken into account as impediments to the performance of the contract under the otherwise applicable law, must be answered in order to examine the issues of foreign mandatory rules and their relation with the transnational public policy exception. The question must also be answered to understand how transnational public policies are given effect: whether rules of transnational public policy are deviations from the otherwise applicable law merely impediments or grounds for nullity under it. The underlying issue could also be formulated as to whether the issues of foreign trade sanctions should be considered at the level of private international law, as choice of law issues, or rather only by treating them as mere contractual issues under the otherwise applicable law. This is discussed below.

4.4 Direct or indirect application of trade sanctions

The traditional view with regard to all foreign mandatory rules, prevailing until the latter part of the 20th century has been that prohibitions under a law foreign to *lex causae* should be treated merely as impediments under the otherwise applicable law.[298] Even some notable contemporary authors hold that no mandatory rules foreign to the *lex causae* should ever be applied, and that such rules may only be taken into account as factual elements in the otherwise applicable law.[299] How does one then take rules into account as factual elements? The arbitrator may, under the applicable law, assert that the performance of the contract has

[298] Van Hecke 1984–1985, p. 116 and Voser 1996, p. 323.
[299] Hobér 2011, pp. 56–57. See also Gaillard – Savage 1999, pp 855, and especially in relation to trade sanctions and other acts of state, Brunner 2008, pp. 273–274. These writers often tend to emphasize the category of *transnational public policy* and state that only secondarily should an arbitrator give any effect to principles hailing from the laws of other countries.

become impossible[300] or that their contract has become void, since it is illegal to have concluded such contract in the first place. Under this type of strict *datum* approach, the so-called indirect mode of application, the foreign trade sanctions' (or any other mandatory rules') legal and statutory nature is disregarded by the arbitrators and the sanction is regarded as a mere factual circumstance under the otherwise applicable law.[301] In this manner, the arbitrator will not have to resort to a choice of law analysis. For example the transnational public policies, discussed above, are often given effect in this manner, without directly applying them but merely giving them effect under the *lex causae* and by considering them as impediments to the performance of the contract or as grounds for the nullity thereof.[302]

A considerable number of authors however assert that there are a number of situations where foreign mandatory rules should be applied as rules of law and not merely as facts under the otherwise applicable law. They hence leave open the possibility that some rules could be considered as foreign mandatory rules that may truly be applied and affect the parties' choice of law. Indeed, most contemporary arbitrators as well as judges seem to agree that that they have the power and sometimes even the duty to apply foreign mandatory rules as legal issues, *i.e*. as public policy rules. Also arbitral literature exhibits that today mandatory rules may indeed be directly applied in arbitral tribunals.[303] Certain authors also state that also trade sanctions should be interpreted just like all other foreign mandatory rules, through the prism of private international law, by considering them as foreign mandatory rules.[304]

In relation to trade sanctions, however, a significant majority of authors and relevant case law would seem to promote the method of indirect application, the *datum* approach. Some have argued that trade sanctions constitute in this respect a special case in the universe of public policy rules due to their indirect mode of application.[305] The reason why many people tend to support the indirect application trade sanctions is, however, simple: unlike some other mandatory rules, such as competition laws, trade sanctions often render the performance of

[300] In such scenario, the mandatory rule forms an event of *force majeure*, frustration, or hardship (hereinafter for the sake of simplicity referred to only as *force majeure).*
[301] Azeredo da Sileveira 2014, p. 36 and van Hecke 1984–1985, p. 116.
[302] See *e.g.* the ICC Award 1110 where the public policy exception was said to function through the *invalidity* or *unenforceability* of the parties' contract.
[303] See chapter 4.5.2 below.
[304] Azeredo da Silveira 2014, pp. 35–64.
[305] Schäfer *et al.* 2005, p. 88.

the contract straight out impossible. If the place where the seller's goods are located implements an export prohibition, this can relatively easily be interpreted through the *force majeure* exception, as an impediment to the performance of the contract. For example the fact that the parties' distribution agreement would breach antitrust laws is not as easily discussed through the notion of *force majeure* in the *lex causae.*

If one is to follow the *datum* approach, foreign mandatory rules may be considered as a factual elements in the otherwise applicable law, by means of:

1. Causing nullity of the parties' contract, due to immorality or contravention with public policy; or
2. Causing unenforceability of the contract by constituting a *force majeure* situation under the otherwise applicable law.[306]

If one decides to consider foreign trade sanctions as factual elements in the parties' contract, the nullity of the underlying contract may normally ensue only when such trade sanctions or other mandatory rules have already been in force at the time of the conclusion of the contract and the contract has been knowingly concluded in breach of the prohibition.[307] In this manner, if the parties had concluded a contract an essential purpose of which is to breach the sanctions legislation of the *lex causae*, the parties' contract could be deemed immoral under the laws applicable to the parties' contract.[308] It may also be that the wording of the sanction

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[306] Brunner 2008, pp. 245–246; van Hecke 1984–1985, p. 115 and van Houtte 1988, pp. 143–147.

[307] *I.e.* in cases of antecedent trade sanctions. See Van Houtte 1988, p. 143 and Brunner 2008, p. 245. Some commentators have also suggested that certain trade sanctions issued by the UNSC could lead to the nullity of the underlying contract not only in relation to contracts entered into *after* the implementation of the trade sanction but also to those contracts that have already existed at the time of the introduction of the sanction. Whether or not nullity would ensue would depend on the wording of the sanction's text and whether or not it provides for retroactive effect. See Brunner 2008, pp. 245–246 and Burdeau 2003, p. 769, who states that it could be imaginable that a UNSC resolution could in cases of certain arms embargoes be worded so that it would lead to the nullity of even existing agreements. So far, however, almost all existing trade sanctions have been worded so that no retroactive effect should be attributed to them. See Burdeau 2001 pp. 273–274 and Burdeau 2003, p. 769. For an example of a rare embargo decree where retroactive effect was ordered, see Matray 1997, p. 93 and the referred Italian Government Decree dated 15 April 1967.

[308] Under Finnish law, it is generally held that contracts where one of the parties has pledged itself to commit a crime are not valid (Finnish: *pätemätön*). (Hemmo 2007, p. 437). As noted above, breaching trade sanctions has been criminalized in Chapter 46 Criminal Act and such contracts could hence be deemed invalid if a contract whose main purpose was to breach a sanction was entered into after the imposition of such sanction. Further, it could be imagined that pledging to breach a *blocking statute* could also lead to the invalidity of the underlying agreement as such activity is sanctioned with fine under law (Section 3 Blocking Statute Act) and breaches of mandatory law as a general rule have been deemed to lead to invalidity of the contract (Hemmo 2007, pp. 436–437).

itself would call for the invalidity of the contract.[309] Similarly, if the parties have entered into a contract to breach transnational public policy rules such as multilateral trade sanctions, the arbitrator could, based on transnational public policy considerations, deem such contract invalid *ab initio*.[310] Mandatory rules besides those of *lex causae* and of transnational public policy should not generally affect the validity of the parties' contract, even if in force at the moment of the conclusion of the parties contract, but may be considered through the other side of the *datum* approach, the *force majeure* exception, as initial legal impediments.[311]

The second and more probably notable category of cases where foreign rules could be given effect as facts under the otherwise applicable law is the situation where the sanction constitutes a *force majeure* situation. Here, the rule can generally be given effect by arbitrators under the following conditions:

1. The non-application of this rule would make performance of the contract impossible;
2. The event constituting *force majeure* indeed was not foreseeable; and
3. The *force majeure* event was not provided for in the parties' contract and was otherwise exterior to the parties.[312]

Under this *force majeure* approach, all public policy rules, domestic or foreign, resulting in impossibility in the performance of the contact, and meeting the criteria of unforeseeability and exteriority, *e.g.* all efficient trade sanctions, would be considered as *force majeure* events whose effect would be assessed based on the *lex causae* and the *lex causae* alone. Under the conception it is not the foreign law as such but rather the fact that it makes the contractual performance impossible that can be considered the *force majeure* event.[313] Normally, the force majeure event would constitute a factual hurdle to the performance of the contract.[314]

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[309] Brunner 2008, p. 244.
[310] Brunner 2008, pp. 245–246.
[311] Brunner 2008, p. 242.
[312] Barraclough – Waincymer 2005, p. 14; Blessing 1997, pp. 33–34 and Marchand 2012, pp. 272-299. These preconditions may be found in most *force majeure* clauses, see *i.a.* ICC Force Majeure Clause 2003 and *force majeure* provisions in sale of goods laws, e.g. Article 79(1) United Nations Convention on Contracts for the International Sale of Goods, adopted on 11 April 1980 in Vienna ("*CISG*"); Article 7.1.7 UNIDROIT Principles 2010 and Section 27(1) Finnish Sale of Goods Act (*Kauppalaki*, 355/1987).
[313] Hochstrasser 1994, p. 72.
[314] See *i.a.* ICC Awards 4462 and 5864 from where American embargo measures against Libya were taken into consideration in a dispute between American and Libyan parties, under the *force majeure* exception in a Libyan law contract. See further the award by Chamber of Arbitration of Milan (Chamber of National and International Arbitration of Milan, final award of 20 July 1992, no. 1491), where trade sanctions against Iraq, issued by Italy

The acceptability of non-performance due to a trade sanction would hence be assessed based on a *force majeure* provision in the applicable law or based on a similar provision in the parties' contract which would then be interpreted in accordance with the *lex causae*. The interpretation of *force majeure* provisions in different legal systems and under different national laws may differ drastically and considering the relevant clause under *lex causae*, rather than under the law proper of the sanction could in some cases lead to significantly different results.[315]

The criteria of impossibility can be deemed fulfilled even in cases of extraterritorial sanctions, where the performance of contract would not be factually impeded by the sanction. The party facing the sanctions could nonetheless face a risk of a penalty, *e.g.* a governmental punishment, such as a criminal sanction, that one should not be expected to face, or alternatively the performance of the contract could for some other reason become economically so unreasonable or unaffordable, as to render the performance of the contract factually impossible. These risks may in many cases as such constitute impossibility and an event of *force majeure*.[316] Hence, no physical impossibility of performance is required for the force majeure provision to have effect but the sanction would naturally need to fulfill the criteria of *force majeure* under the otherwise applicable law.[317]

Advocates of both direct as well as indirect application would seem to agree that transnational public policy may affect the parties' choice of law and that transnational public policies should normally merely be given effect under the otherwise applicable law.[318] The *datum* approach should thus be the favored method when it comes to issues of transnational

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and the EU, were considered as an impediment to the performance of an Iraqi law contract between Italian and Iraqi parties.

[315] Matray 1997, p. 77.

[316] Azeredo da Silveira 2014, p. 47; Hochstrasser 1994, p. 72 and Marchand 2012, p. 230. For an analysis of requirement of impossibility under CISG see *i.a.* Brunner 2008, pp. 212–213.

[317] It is thus the *lex causae* under which the parties will assess the material effect of the sanctions. This would equally be the case even if the arbitrator would choose to determine the applicability of the trade sanction based on the theory of foreign mandatory rules, discussed below. Even if one were to follow the foreign mandatory rules theory, the approach would still only govern the question of whether the sanction could be taken into account when resolving the parties' dispute. The choice of law issue would thus constitute only one additional step in determining how the sanction may affect the parties' relationship. The material questions will in every case be determined on the basis of *lex causae*. See also Azeredo da Silveira 2014, pp. 191–192.

[318] See Brunner 2008, pp. 273–274 for an advocate of indirect application and Azeredo da Sileveira 2014, pp. 62–64 for supporter of direct application.

public policy. What sets the two sides apart is their position in relation to prohibitions that do not converge with transnational public policy.

Some have, in fact, gone as far as stating that the application of trade sanctions as a factual circumstance is non-controversial.[319] However, even if most writers would seem to share the view of applying trade sanctions as facts[320], it could be seen as an overstatement to call such application non-controversial. Legal literature does not present a unanimous picture[321] and at least some court practice illustrates that at times sanctions are indeed applied as factual circumstances[322], but at other times as foreign mandatory rules[323]. In fact, a party who wishes to invoke a trade sanction often does so by invoking both *force majeure* situation under the otherwise applicable law and by invoking the sanction as a foreign mandatory rule.[324] Hence, as direct application of trade sanctions as foreign mandatory rules seems to be accepted at least in part, it would be careless to disregard such application altogether.

The benefits of the *force majeure* approach have also been criticized, even if considering trade sanctions as mere factual circumstances avoided the troublesome choice of law problems posed by application of foreign mandatory rules. It has been asserted that it is arbitrary and an unsatisfactory shortcut to favor the laws of one country by a way of dissociating the factual circumstances created by a trade sanction from its nature as a politically directed legal rule merely because certain sanctions happen to be effective or not effective.[325] It should be noted, however, that the arbitrator has no other choice than to apply or to not apply the rules as mandatory rules. Therefore, the arbitrator will in any case have

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[319] Barraclough – Waincymer 2005, p. 14; see also Waincymer 2012, p. 1017.
[320] See Brunner 2008, pp. 272–273; Mayer 1986, pp. 291–292 and Voser 1996, pp. 353–354.
[321] On application as foreign mandatory rules, see *i.a.* Azeredo da Silveira 2014, pp. 127–190 and van Houtte 1997, pp. 167–168.
[322] See footnote 314 and ICC Awards 2216 and 3881, SCC Award V0007/2008 and the award in AAA arbitration between Northrop Corporation and Triad International Marketing SA, reported in U.S. District Court for the Central District of California - 593 F. Supp. 928.
[323] See at least the judgment in the *Sensor* (District Court at the The Hague 17 September 1982) dispute where a Dutch court considered American export prohibitions under article 7(1) Rome Convention (discussed in chapter 4.5.4 below) in connection with delivery of pipeline technology from Netherlands to the USSR under the Dutch law.
[324] See *i.a.* the SCC Award V007/2008 in *Naftogaz v IUGAS*, rendered 19 October 2010, where failure to attain export license (*i.e.* not trade sanctions *stricto sensu*) was invoked as both foreign mandatory rules and *force majeure* events.
[325] Azeredo da Silveira 2014, pp. 47–48.

to favor the laws of one country and the general presumption should be to apply the rules of law chosen by the parties.

It has also been argued, that if sanctions were to be considered strictly as factual circumstances, the arbitrators would be compelled to apply the sanctions in every case where the sanction would provide any factual hurdle to the performance of the contract. This would mean that an arbitrator would have to *lend a hand to one State in its attempt to isolate financially and commercially another* no matter what the underlying rationale behind the sanction, or its connection to the parties and their contract was.[326] The arbitrator could thus be forced to enforce a sanction whose claim lacked legitimacy. It may be asked, however, what are such legitimate grounds for refusing to apply a foreign trade sanction that do not fall into the category of transnational public policy? If the prohibition aims to promote a goal that is completely morally unsound it may be refused applicability based on transnational public policy. If the sanction is not morally unsound, it is hard to imagine a situation where the arbitrator should nonetheless apply the laws of one state over another, if the first does not represent a transnational consensus or the only morally legitimate view. Conversely it has also been argued that if a state were unable to enforce a prohibition, the arbitrator would be left with no other option than refusing to apply the prohibition, even if the prohibition had served a legitimate purpose.[327] The same argumentation as above may be applied here. Why should an arbitrator, who has no *lex fori*, choose to apply a trade sanction if it does not form a part of the law proper of the contract or the transnational public policy? Morally unsound outcomes may be rebutted through the application of transnational public policy. If the prohibition on the other hand involves a risk of a criminal or administrative sanction, the arbitrator may take this risk into account when assessing the situation under the otherwise applicable law and its *force majeure* provisions or when assessing the legality of the contract under the otherwise applicable law.

Considering trade sanctions as well as other impediments to the performance of the contract as factual circumstances, is an exception and a shortcut in the system of mandatory laws and

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[326] Azeredo da Silveira 2014, pp. 47–48.

[327] For an award where an export prohibition of a foreign country is disregarded, see the award by the Court of Arbitration of the German Coffee Association in Hamburg, dated 19 March 1987, where Colombian export prohibitions were not given effect under the otherwise applicable German law since Colombian authorities as a general rule did not enforce the prohibition to export coffee.

public policies. The exception is nonetheless well structured, its application being limited to situations where the performance of the contract is rendered impossible and where the sanction was unforeseeable and not provided for in the parties' agreement. The exception also provides generally consistent and relatively predicable outcomes and it is widely recognized by arbitral tribunals as well as national courts. Indeed, in a large majority of cases arbitrators seem to rely on the *datum* method.[328] If a satisfactory and predictable result may be achieved without intervening the party autonomy and the chosen law, it may be asked what additional value is brought by considering such situations as foreign mandatory rules.

Nevertheless, and as the court and arbitral practice do not present a unanimous picture, the following does not limit itself to considering trade sanctions' application as a mere factual circumstance under the otherwise applicable law, but also discusses trade sanctions as foreign mandatory rules to the extent necessary for understanding the legal situation and due to the fact that tools such as the special connection test may also be used in relation to indirect application of foreign mandatory rules. Further, the effect of the mandatory rules of the *lex arbitri*¸ the place of arbitration, may not generally be discussed through the *datum* approach if the *lex arbitri* is external to the parties' dispute. In these cases, a sanction in the *lex arbitri* cannot render the performance of the parties' contract impossible, and cannot thus constitute an event of *force majeure*. There may still be a risk that its public policy provisions would render the award unenforceable in potential setting aside proceedings. There should, therefore, be some way for considering these issues. The general theory of application of foreign mandatory rules in arbitration proceedings, *i.e.* laws foreign to the *lex causae* is, however, a topic that has raised considerable amount of debate and would warrant a thesis in itself. The below thus only offers a brief excursion to the matters of foreign mandatory rules relating to the application of trade sanctions.

4.5 Trade sanctions and foreign mandatory rules

4.5.1 General remarks

Having concluded that arbitrators may also, in principle, consider trade sanctions as foreign mandatory rules, and not only as factual elements under the *lex causae*, the next question

[328] See *i.a.* the cases in footnote 322 above.

must be, whether arbitrators are at all allowed to give foreign mandatory rules effect. If a trade sanction cannot be deemed to form transnational public policy and if the sanction is not embodied in the applicable law, does that mean that such trade sanction will have to be in every case disregarded by the arbitrator? What about cases where a unilateral trade sanction of a third country imposes itself over the parties and their contract? Can or even must these sanctions be taken into account, and if yes, in what way? As multilateral trade sanctions were mainly discussed in the previous subchapters, the following will not as a general rule discuss those categories of sanctions.

To tackle the problem of foreign mandatory rules, three questions must be answered:

1. *May* the arbitrator consider foreign mandatory rules?
2. If yes, *must* he consider them?
3. If yes, which mandatory rules should be considered?[329]

These questions will be discussed in the following chapters so that the first two questions are discussed in chapter 4.5.2 and the third question in chapters 4.5.3 and 4.5.4.

4.5.2 May or must an arbitrator consider foreign mandatory rules?

As discussed above, some authors are highly skeptical of direct application of foreign mandatory rules and assert that the application of transnational public policy should suffice to rebut inequitable outcomes[330], whereas most consider such application allowed, some even obligatory[331]. Arbitral case law would also seem favorable to the latter view: a large number of arbitral awards seem to prove that arbitrators indeed are allowed to apply foreign mandatory rules, even if they do not form transnational public policy.[332] National judiciaries have also confirmed that matters involving foreign mandatory rules are arbitrable and that arbitrators, as a matter of principle, are allowed to apply the foreign mandatory rules.[333]

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[329] Mayer 1986, p. 277.
[330] See Gaillard – Savage 1999, p. 855 and Hobér 2011, pp. 54–57.
[331] Barraclough – Waincymer 2005, pp. 226–227; Blessing 1997, p. 23 and Born 2014, pp. 2712–2716.
[332] See *i.a.* ICC awards 16168, 14046, 8528, 6697, 6320 and 6294.
[333] Most notably, see the well-known *Mitsubishi* case (United States Supreme Court in 473 U.S. 614 (1985), (Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc), 02.07.1985) where the US Supreme Court concluded that matters pertaining to antitrust law could be subjected to arbitration and that, in accordance with the so-called *second-look doctrine*, the national judiciaries should be able to exercise certain level of control at the setting aside and enforcement proceedings. On arbitrability of trade sanctions issues, see chapter 2.4 above.

Further, a number of international resolutions and recommendations have also confirmed that foreign mandatory rules may as a general rule be applied in arbitral proceedings. For example the ILA[334] and the Draft Hague Principles on the Choice of Law in International Contracts [335] have come to the conclusion that arbitral tribunals have the power of considering foreign mandatory or public policy rules.[336] Yet further, also the fact that an arbitrator having applied a rule outside the *lex causae* does not in itself render the award neither unenforceable under the New York Convention nor void under most national arbitration laws may be interpreted as in indirectly allowing the application of foreign mandatory rules.

Additionally, if one were to look for analogy in the realm of private international law and international commercial litigation, similar tendencies may be conceived. A number of authors recognize the importance of certain private international law instruments, most notably the Rome Convention and their applicability to arbitral proceedings by analogy.[337] Also other private international law instruments seem to allow the consideration of foreign mandatory rules.[338] According to Article 7(1) Rome Convention as well as Article 9(3) Rome I Regulation, effect may be given to the mandatory rules of the law of another country, given that certain criteria are met. If one accepts the analogous interpretation of the private international law instruments, it would seem clear that arbitrators are indeed, as a general rule, allowed to consider the foreign public policy rules they consider appropriate. As discussed above, some would nonetheless prefer not to apply any foreign rules at all. The possibility to apply such rules is however beyond doubt.

A solution where all domestic and foreign mandatory rules would have to be applied by an arbitrator, irrespective what purpose they serve or what their connection to the dispute was, would in no way be sustainable or reasonable. [339] Therefore the question whether an

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[334] ILA Report and Recommendations on Ascertaining the Contents of the Applicable Law in International Arbitration 1991.
[335]Article 11(2) Draft Hague Principles on the Choice of Law in International Contracts.
[336] See also the International Law Institute and International Chamber of Commerce ("ICC") working group resolutions referred to by Born 2014, pp. 2714–2715.
[337] In relation to trade sanctions, see Azeredo da Silveira 2014, especially p. 112–117. In relation to public policy in general, see Barraclough – Waincymer 2005, pp. 228–233.
[338] See *i.a.* Article 9(3) Rome I regulation or Article 19 SPILA.
[339] Such solution would not respect party autonomy, would easily lead to unnecessary state legal expansionism and conflicts between mandatory rules and would weaken the predictability of the outcome of the award, just

arbitrator *must* apply all foreign mandatory rules is unwarranted. An arbitrator should never be obligated to apply foreign mandatory rules, or give them effect under the otherwise applicable law, just because one of the parties relies on them.[340] What should be asked, is which foreign rules should an arbitrator apply? There must thus be some way for the arbitrator to exercise discretion over the applicable foreign mandatory rules.

First, before examining the theory of foreign mandatory rules and the manners in which arbitrators may exercise discretion over the rules in a more strict sense of the word, one should examine what effect the national public policies of the potential places of enforcement and annulation proceedings may have on the parties' relationship. The rules that may be used to set aside or deny recognition and enforcement of an award, as discussed in the previous main chapter, could also be considered and given effect in the arbitral tribunal if the arbitrator wishes to render an effective award that will not be set aside or denied recognition. What effect should they be given by the arbitrator?

4.5.3 Mandatory rules of *lex arbitri* and place of enforcement

Besides transnational public policy considerations, it may be argued that the notion of public policy, as it is applied in the setting aside and enforcement proceedings, should affect the arbitrator's discretion as to ensure the award's enforceability.[341] One could argue that the trade sanctions, or any other mandatory rules of the *lex arbitri* should affect the arbitrator's discretion since they may affect the award's validity, yet cannot be considered through the *datum* approach. Even if one were to consider trade sanctions as foreign mandatory rules, the enforceability concerns are a real issue that must be considered to ensure efficient procedure and adequate legal protection to the parties.

Indeed, arbitration's greatest advantages over traditional commercial litigation, its speed and efficiency, would be greatly undermined if public policy and mandatory rule related issues would need to be independently assessed in *ex post* judicial challenges and if the arbitrator

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to name some of the flaws of this type of argumentation. For further criticism, see Barraclough – Waincymer 2005, pp. 21–22.

[340] Lazareff 1995, p. 143.

[341] See *i.a.* Hobér 2011, p. 55 who considers that only the truly international public policy and the mandatory rules of places of arbitration and enforcement would even in principle be able to limit the party autonomy in the choice of law. Hobér, however, concludes that the latter category should not in the end be given any effect.

was deprived of the possibility consider rules of the seat or potential places of enforcement.[342] It should be in the parties' as well as in the arbitrator's interest to carry out the proceedings as efficiently as possible, and also, to avoid the publicity related to the setting aside or enforcement proceedings and to avoid the potentially notable costs associated with it.[343] Therefore, also considering the mandatory rules of the seat and those of potential places of enforcement should be in the interests of the parties as well as the arbitrator.[344] As considering all possible places of enforcement and their public policies is typically an impossible scenario, it has been suggested that only probable places of enforcement would have to be taken into account in the assessment.[345] In many cases, for example the location of the assets under dispute may indicate the future places of enforcement.

The type of argumentation that requires the arbitrator give special weight to the public policies of the seat and the place(s) of enforcement, has been applied in a number of arbitral awards.[346] In these cases it has often been argued that a foreign mandatory rule would have to be applied in order to ensure the enforceability of the award. Article 41 ICC Rules, reading "*[i]n all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law*" is also often applied in these cases.[347] Some argue that the said Article 41 would impose the tribunal an obligation to render an enforceable award.[348] If the arbitrator would consider himself bound to render an enforceable award, this would also imply that he would be under an obligation to consider the possible public policy scrutiny in national courts, as discussed above. This would mean, that the arbitrator could be bound to apply EU public policies, potentially including trade sanctions that are included in the laws of the potential places of enforcement and the seat of arbitration.

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[342] Bermann 2012, p. 420.
[343] Barraclough – Waincymer 2005, p. 215.
[344] See however Hobér 2011, p. 55 who argues that enforceability issues should not be given weight as the potential risk of non-enforceability should be borne and addressed by the parties, not the arbitrator.
[345] Derains 1987, pp. 255–256; Goldman 1963, pp. 433–434 and Waincymer 2012, p. 186.
[346] See *i.a.* ICC Awards 6697 and 16168.
[347] Article 41 corresponds to Article 26 in 1988 ICC Rules, applicable in award 6697 and Article 35 in 1998 ICC Rules applicable in award 16168.
[348] Bühler – Webster 2005, p. 398.

The reading of the Article 41 ICC Rules according to which the arbitrator is under a *duty* render an enforceable award, has, however, been widely deemed incorrect. The said article only obliges the tribunal to *make every effort* to achieve enforceability and further, such efforts must only be made when a matter *not expressly provided for in the Rules* is at hand.[349] Nevertheless, at least in awards where recognition and enforcement would have with relative certainty been denied in national courts, the arbitrator seems to be eligible to give at least some effect to the mandatory rule.[350]

The ICC Rules contain also another, peculiar feature typical to the ICC Rules, to ascertain the enforceability of an award.[351] According to Article 33 ICC Rules, before finally rendering the award the draft award is reviewed by the secretariat of the ICC. During the revision, the Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. Further, according to Appendix II, Article 6 of the ICC Rules, *"[w]hen the [secretariat] scrutinizes draft awards in accordance with Article 33 of the Rules, it considers, to the extent practicable, the requirements of mandatory law at the place of the arbitration*." The wording would seem to imply that, at least under the ICC Rules, mandatory rules of law at the place of arbitration should be considered. It should however be noted that the wording merely requires the Court to consider them and even that only to the extent practicable. Additionally, even if the Court would draw the tribunal's attention to such mandatory rules, the tribunal would be under no obligation to apply them. Further, according to an ICC commentary to the ICC Rules, the rules should be interpreted so that the substantive mandatory rules of the seat may be considered only if they have a close connection with the parties' dispute.[352] This would imply that the rules of the seat would have to be comply with the same or at least similar requirements as all other foreign mandatory rules.[353]

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[349] Derains – Schwartz 2005, p. 384 and Fry *et al*. 2012, pp. 422–423. FAI Rules (Article 50) as well as SCC Rules (Article 46) and LCIA Rules (Article 32.2) contain an essentially similar provision that should be interpreted accordingly (Savola 2015, pp. 461–462).
[350] See especially ICC Award 6697 where the arbitrator rightly considered the foreign insolvency legislation that would have made the enforcement of the award impossible.
[351] Fry *et al.* 2012, p. 327.
[352] Fry *et al.* 2012, p. 226.
[353] On the requirements, see chapter 4.5.4 below.

Notwithstanding the specific provisions of the ICC Rules, the risk of public policy based annulment or non-enforcement of the award could, however, serve as a last resort limitation to the arbitrators' discretion and the rules applied by national courts could serve as a tool for the arbitrator when considering the applicability of mandatory rules in arbitral proceedings.[354] This could especially be true in cases where the non-enforceability constitutes an inevitable consequence of rendering an award.[355]

However, it could also be asserted that an arbitrator should not preventively apply any such foreign public policies just in order to ensure enforceability, since the primary concern of the arbitrator should not be to render an enforceable award, but rather the correct one.[356] Under this conception, the parties would have to bear the risk of non-enforceability by taking relevant matters into account when entering first into an agreement and choosing the applicable law. It could be argued that an arbitrator should under no circumstances be entitled to alter this allocation of risk between the parties.[357] Too liberal an application of foreign public policies would easily constitute an undermining of the parties' autonomy and narrow down the legal predictability of the award. Further, considering only the mandatory rules of the place of arbitration and enforcement may easily be interpreted as favoring the mandatory rules of these states over others'.[358]

However, if the risk of non-enforceability and the potentially large costs related to it may be avoided through simple consideration of the relevant mandatory rules at the stage of arbitration, it may be asked, why should an arbitrator not consider such rules? It should be clear that the public policies of the countries of place of arbitration and the probable places of enforcement should be considered already at the stage of arbitration, as not to give rise to unnecessary suits of annulation or non-enforcement.[359] This should be a matter of professional pride, rather than a strict obligation for the arbitrator.[360] This conclusion does not, however, mean that all mandatory rules of the places of arbitration and enforcement

[354] Marchand 2012, p. 202.
[355] See *i.a.* ICC Award 6697 where insolvency legislation at the place of enforcement was taken into consideration as disregarding it would have rendered the award unenforceable.
[356] On this type of reasoning, see Geisinger *et al.* 2012, p. 428 and Brunner 2008, p. 280.
[357] Hobér 2011, p. 55.
[358] Voser 1996, p. 345.
[359] Gaillard 1995, p. 223.
[360] Redfern *et al.* 2009, p. 550.

should be applied automatically, but rather that the risk of annulation and non-enforcement should be duly considered and its effect taken into account.

Indeed, only in cases where the non-application of mandatory rules of the arbitral seat or the place of enforcement would with relative certainty lead to non-enforceability, should such rules be taken into account by the arbitrator.[361] However, should the threshold for certainty of non-enforcement not be met, the likely non-enforceability may also serve as a proof of the application-worthiness of the mandatory rule, under the special connection method, discussed below.[362] With the expansionist notions of public policy in the CJEU[363], and as a consequence, in national courts in Europe, these considerations may play increasingly large role in the future. If the national courts or the CJEU would deem trade sanctions to constitute public policy, the arbitrator should be able to consider these trade sanctions already during the main proceedings. Arbitrators should not knowingly render unenforceable awards. The notion of public policy at the seat of arbitration and at the places of enforcement, as predicted by the arbitrator, should in this way form a minimum level of the public policy control by the arbitrator who should take reasonable measures to predict the probable places of enforcement and their position in relation to public policy matters.

4.5.4 Special connection method

If the arbitrator wishes not to address issues of trade sanctions through the *datum* method or by considering the public policies of places of seat and enforcement of the award, further tools may developed to answer the dilemma. Indeed, even in these cases not all trade sanctions or other mandatory rules that claim applicability should be applied. The literature has hence prescribed some general methods for exercising discretion over the applicability of foreign mandatory rules. A number of authors and arbitrators have attempted to find the applicable foreign mandatory rules through analogous application of Article 7(1) Rome

[361] In this assessment the arbitrator should, among other things, consider whether the potential place(s) of enforcement tend to refuse enforcement to arbitral awards set aside at the place of arbitration. On this, see chapter 3.3.1 above.
[362] See Azeredo da Silveira 2014, pp. 162–163 and chapter 4.5.4 below.
[363] See chapter 3.4.2 above.

Convention, or equivalent rules of private international law[364], through the so called *special connection method*. [365] According to Article 7(1) Rome Convention:

> *When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.*

Before looking into what requirements Article 7(1) Rome Convention and the special connection method sets for the application of foreign mandatory rules, a brief excursion is in place to uncover what is meant in the said Article 7(1) by *giving effect*, as opposed to applying. The choice of words seems to imply that courts should be left with some discretion in applying the foreign mandatory provisions and combining them with the applicable law, sort of a middle ground between purely applying and not applying at all.[366] The Giuliano–Lagarde Report, a preparatory works for the Rome Convention, further states that "*the words 'effect may be given' impose on the Court the extremely delicate task of combining the mandatory provisions with the law normally applicable to the contract in the particular*

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[364] Most notably, see Article 19 SPILA, containing provisions essentially similar to Article 7(1) Rome Convention. Article 9(3) Rome I Regulation, contains also a similar provision. The requirements for considering foreign mandatory rules under it are however in one manner notably dissimilar: Rome I Regulation only allows consideration of the overriding mandatory provisions of the law of the country *where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful*. Therefore, under Rome I Regulation, in a way not dissimilar to the *force majeure* approach discussed above, effect could be given only to those rules that would affect the performance of the contract. For this reason, the special connection test has in literature been based on the Rome Convention and its Article 7(1).

[365] See at least Azeredo da Silveria 2014, p. 127–190; Barraclough – Waincymer 2005; p. 228–233 and Blessing 1997, pp. 32–33. Besides the special connection method, at least one other method of exercising discretion over foreign mandatory rules has emerged. The so-called *legitmate expectations test* is based on balancing the parties' expectations on the one hand and the legitimacy of the interest protected by the mandatory rule on the other. This method in most cases very much resembles the transnational public policy method presented above and does not as such, however, offer much additional discretion in determining the applicability of foreign mandatory rules. (Barraclough – Waincymer 2005, pp. 234). For these reasons, the method does not as such offer much help in disentangling issues of foreign mandatory rules, and will thus not be discussed below.

[366] Marchand 2012, p. 225.

situation in question".[367] In an early commentary, van Hecke has however suggested that the choice of words, *giving effect*, as opposed to *applying*, would mean that arbitrators should consider the mandatory rules as *force majeure* events and that even in such case, the arbitrator would be bound to consider all the factors required by the Article 7(1), *i.e.* the closeness of the connections, the mandatory nature and most notably the nature and the purpose of the law.[368] Such view has been contested in later doctrine. Question whether a given situation constitutes a *force majeure* impediment must be answered through the provisions of *lex causae*, and should not be subject to a test of legitimacy beyond the control of transnational public policy. *Force majeure* provisions do not normally require the impediment to be "legitimate".[369] Therefore, giving effect should not be interpreted as to mean taking into account the otherwise applicable law.

We now come back to the theory of special connection, or *Sonderanknüpfungstheorie*, the contents of which are essentially laid out in the above provision of the Rome Convention. The Article 7(1) contains three different elements or branches. According to it, to establish that a foreign mandatory should be applied in a given case, regard shall be given to:

1. *the mandatory nature* of the law;
2. *a close connection* between the rule and the dispute at hand; and
3. *the application-worthiness* of the rule, *i.e.* the nature and purpose of the law and the consequences of its application or non-application.[370]

The mandatory nature requirement of the rule does not typically pose problems with regard to trade sanctions. Trade sanctions by nature claim wide applicability,[371] and thus even if not explicitly stated, strive to apply to all contractual relationships within their purview, regardless of any choice of law by the parties.[372] They typically are mandatory rules by definition.

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[367] Article 7 paragraph 3 of the Giuliano–Lagarde Report.
[368] Van Hecke 1984–1985, p. 117.
[369] Marchand 2012, pp. 230–232.
[370] Generally on the application of the special connection test, see at least Azeredo da Silveira 2014, pp. 133–147 and on the actual application of the test *i.a.* ICC Awards 6294 and 6500. Some authors have formed the branches differently, but the essential contents of the list nonetheless remain same, reflecting *i.a.* Article 7(1) Rome Convention and Article 19 SPILA. On this, see *e.g.* Blessing 1999, p. 62-63.
[371] See chapter 2.1 above.
[372] Azeredo da Silveira 2014, p. 61.

The *close connection* test with regard to non-extraterritorial application of trade sanctions, *i.e.* whether the dispute at hand and the contemplated mandatory rule are adequately closely connected, also does not pose many problems. If the contract or a part of it has to be performed, or a party must take measures under the contract within the territory of the state that has enacted the alleged mandatory rule, a close connection must be at hand.[373] Therefore, in cases where the performance is impeded by the sanction (and could clearly also be interpreted as causing a *force majeure* impediment) the close connection must exist.

As for extraterritorial trade sanctions, *i.e.* those that claim applicability not based on their effect in the performance of the parties contract but on other grounds, such as the nationality of the parties, attention must be drawn to some further possible criteria. According to the Giuliano – Lagarde Report, a close connection *may* exist if one of the parties is domiciled or has its place of business in the state that has enacted the rule.[374] As presented by arbitral practice, this does not, however, mean that the arbitrators would always have to consider that a close connection exists.[375] It is rather generally required that the foreign mandatory rule has a connection with the contract as a whole and that the connection is a genuine connection.[376]

It has been asserted that a trade sanction cannot be taken into account when its scope exceeds that permitted by international law.[377] Hence, as for *truly extraterritorial trade sanctions*, a close connection cannot be deemed to exist if the arbitral tribunal has concluded that the sanctioning state should not under the rules of public international law be allowed to prescribe such extraterritorial rules.[378] Reference to public international law does not, however, offer definite answers, since as noted above, the jurisdiction to prescribe rules has

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[373] Voser 1996, p. 346; Waincymer 2009, p. 32 as well as Azeredo da Silveria 2014, pp. 143–144, and the referred ICC Awards 4132 and 6500. See also similar provision in Article 9(3) Rome I Regulation that does not require a close connection but instead allows only application of foreign mandatory rules "*of the law of the country where the obligations arising out of the contract have to be or have been performed*" must be considered. Notably, the scope of close connection is much narrower with regard to Rome I regulation than that of the Rome Convention.
[374] Article 7 paragraph 2 of the Giuliano–Lagarde Report.
[375] Amsterdam Grain Trade Association, Award of 11 January 1982, where Austrian exchange control regulations were not deemed to have a close enough connection with the dispute between Austrian and Dutch parties when the transaction took place in the Netherlands and no other sufficient connection to the parties' dispute was proved to exist.
[376] Article 7 paragraph 2 of the Giuliano–Lagarde Report.
[377] Van Hecke 1984–1985, p. 119.
[378] Van Houtte 1997, p. 168.

not been defined unanimously in national laws and the manner in which countries define their jurisdiction under international law differs from one state to another.[379] Further, even when discussing states' jurisdiction to prescribe extraterritorial statutes under the rules of international law, one of the exigencies for the jurisdiction has been said to be the close connection between states.[380] This may lead to a stalemate where it is extremely difficult to conclusively define when a close connection is at hand. However, if a trade sanction has no connection to the territory, the nationality or residence, or the security interests of the sanctioning state, and the application or non-application of the sanction would have no effects on the territory of the sanctioning state, no close connection can be deemed to exist, and as a consequence, the rule should not be applied in the parties' relationship.[381]

Furthermore, substantive public policies of the seat of arbitration do not necessarily have a close connection only because they form a part of the *lex arbitri.*[382] If one were to strictly follow the special connection method, the mandatory rules of the *lex arbitri* should be considered like any other foreign mandatory rules and only be given effect if they have some other close connection with the parties' dispute. They may nevertheless have an effect if they would materially affect the enforceability of the award, as discussed above.[383]

The third arm of the theory of special connection, the *application-worthiness* test, largely corresponds to the test of application-worthiness described above in relation to non-application of certain unilateral trade sanctions due to transnational public policies.[384] In a

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[379] See chapter 2.1 above.
[380] Brownlie 2008, p. 312.
[381] Azeredo da Silveira 2014, pp. 175–176. See also the referred *Sensor* decision (Compagnie Europeenne des Petroles S.A. v. Sensor Nederland B. V) where American export prohibitions were disregarded in a Dutch court based on a lack of close connection with the parties dispute. The court examined the principles of nationality (none of the parties was from US and the court deemed that the "control theory" applied in American sanctions did not justify the application of the sanctions under international law), protection (court deemed that the category of security interests did not include the foreign policy interests that the US sanctions protected) and effects (the court held that the sanctions did not have any direct effect on US territory). Hence, the court concluded that US sanctions regulations against the USSR lacked a close connection with the parties' dispute.
[382] Voser 1996, pp. 346–347.
[383] See *i.a.* the Amsterdam Grain Association Award of 11 January 1982 in which it the tribunal considered the effects of potential non-enforceability of the award when deciding whether to apply or not a foreign mandatory rule.
[384] In fact, the question of non-application of the unilateral sanction of the *lex causae* based on transnational public policy may actually be viewed as a question of the application-worthiness of the unilateral embargo against the standards of transnational public policy. With regard to sanctions in *lex causae*, the close connection and mandatory nature arms of the special connection test are easily satisfied, since the *lex causae* naturally has a close connection with the parties' dispute and since the sanction presumptively is a mandatory rule in the

way similar to assessment of application-worthiness under the transnational public policy exception, the arbitrator should pay heed to the underlying purpose and nature of the rule, how widely such rule has been implemented and what the actual effects of its application or non-application are. However, when a unilateral sanction is embodied in the *lex causae*, the general presumption should be the application of the sanction, whereas when the sanction is embodied in a foreign law, this presupposition should be overturned and the foreign law applied only in exceptional cases. Applying the public policy or foreign mandatory rule should be an exception to the main rule.

With regard to the purpose and nature of the sanction, the threshold should be the same as it is with regard to the transnational public policy control. Both in relation to transnational public policy as well as in relation to foreign mandatory rules, the protected interest should be adequately legitimate as to overturn the parties' choice of law and their legitimate interests. In assessing the underlying nature and purpose of the rule, similar matters such as rules of international law may be taken into account. For example in cases where the UNGA has condemned a trade sanction, its application could with relative certainty deemed inappropriate.[385]

Also similarly to the transnational public policy exception, the actual outcome of the application will all things considering have to be appropriate, and regard must be given to the consequences of application and non-application of the rule. Hence, if the measure does not effectively protect the intended public interest, it should not be applied. This assessment could also include considering the potential control at the setting aside or recognition and enforcement judiciaries.[386]

The level of universal acceptance of the rule should not, however, be given as much value as in the transnational public policy assessment. A mandatory rule, or trade sanction, may

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applicable law. Some authors have indeed contended that all mandatory rules, those pertaining to *lex causae* as well as all others, should be treated equal so that no law would have a presumptive priority over others and that the rules of *lex causae* should go through the same scrutiny as all other mandatory rules. See Voser 1996, pp. 339–340. For a contrary view, see Barraclough – Waincymer 2005, pp. 220–221.

[385] See for example the US embargo against Cuba that has been multiple times been condemned by the UNGA and the resolutions referred to in footnote 294 above. Similarly, as discussed above in relation to transnational public policy, if the trade sanction is based on a non-binding resolution of the UNSC or the UNGA, the sanction should as a general rule be deemed to serve a legitimate purpose. See Azeredo da Silveira 2014, p. 154.

[386] Azeredo da Silveira 2014, p. 146 and chapter 4.5.3 above.

serve a legitimate interest and be given effect as a foreign mandatory rule, even if it is not universally shared.[387] The protected interest as such should, nonetheless, be shared by the international community as such. Such sanctions, representing *universally recognized legally protected interests* could come into play and be used to interfere with the parties choice of law.[388] Additionally, for example, it could be possible that a country would impose unilateral sanctions and only later would the actions of the sanctioned state be deemed inappropriate by the UNSC. Universal protection may nonetheless serve as a sign that the rule protects a legitimate interest but does not as such does not guarantee its legitimacy.[389]

Despite these considerations on the special connection method and foreign mandatory rules in general, it should be again emphasized that in vast majority of cases relating to trade sanctions, the arbitrator should refrain from employing the foreign mandatory rules method. The arbitrator should beware of becoming a mere guardian of values of personal morality, which he is not. The exceptions of transnational public policy and the indirect method offer the arbitrator with a generally sufficient toolbox to tackle the issues of trade sanctions and public policy. Most authors as well as arbitral tribunals have refrained from resorting to this type of choice of law analysis, where possible.

[387] Azeredo da Silveira 2014, p. 156.
[388] See chapter 4.3.4 and Voser 1996, p. 351.
[389] Barraclough – Waincymer 2005, p. 231.

5 Conclusions

5.1 Summary of findings

The above has demonstrated some of the problems and attempted to provide clarity to questions of choice of law and enforceability in disputes relating to trade sanctions. Questions of trade sanctions face the classical dilemma of international arbitration and public law issues: the parties' autonomy and their interests may go against the will of sovereign states. As may be clearly observed from the above, it is a tough task to present a comprehensive solution for the questions that would cure all issues and provide a watertight answer to the problem. The above presented framework has, however, attempted to systematize different types of trade sanctions and the different situations in which they may become applicable.

This study firstly discussed the general framework of different types of trade sanctions. In terms of types of trade sanctions, the most significant choice of law and enforceability issues pertain to the distinction between multilateral and unilateral trade sanctions. Multilateral trade sanctions are based on UN decisions whereas unilateral sanctions are not. It was also noted that practically all trade sanctions in Finland are implemented through certain EU mechanisms and that with the rise of EU's CSFP, non-EU sanctions are have become practically extinct in Finland. Also, some brief remarks regarding arbitrability of trade sanctions related disputes were made, and it was concluded that one should, as a general rule, be able to resolve issues pertaining to trade sanctions through means of international arbitration.

The research question pertaining to setting aside as well as recognizing and enforcing trade sanctions related awards was examined in the third main chapter of this study. First, a general framework for the purpose of understanding issues of public policy was presented. According to the presented systematization, public policies may affect the decision-making of national judiciaries as *fundamental principles, public policy rules* (mandatory rules) or as *states' international obligations.* The procedural framework in which Finnish public policy may become applicable was discussed in the following subchapter. It was here concluded that the notion of public policy in relation to setting aside proceedings on the one hand and recognition and enforcement procedures on the other are essentially similar.

The scope of national, material public policy in Finnish judiciaries was concluded to be narrow yet still covering certain cases where the award would otherwise lead to illegality and to a contravention with Finnish law. This way, in a mostly hypothetical scenario, a Finnish trade sanction could be deemed to form an autonomous national public policy that could be used to set aside or refuse recognition and enforcement of an arbitral award. It was thereafter concluded that national courts should as a general rule only pay attention to their own respective public policies and disregard the mandatory laws of other states. Therefore, public policies originating from a third country should not be given effect in national judiciaries. The purpose of the public policy control in national judiciaries is to control the compliance with certain fundamental legal and moral standards of that state. It should thus not be the mission of the judge to find the materially correct solution and to balance the parties' interests, but rather only to ensure the compliance with the public policy of that country.

Since trade sanctions normally originate from the EU, a review of the scope of EU public policy was made. It was concluded that in national courts, the general trend has led to a narrow interpretation of public policy and general rule of enforceability and validity of the award, whereas the EU has favored an expansive notion of public policies whereby large categories of rules may potentially be applied as public policies. It was argued that if EU judiciaries were to face a request for a preliminary ruling regarding the public policy status of EU trade sanctions, they could easily incline towards non-enforcement or invalidity of the award based on the alleged public policy status of the said restrictive measures.

The research question pertaining to trade sanctions in arbitral tribunals was discussed in the fourth main chapter. Two different main methods for considering issues of trade sanctions were discussed: the transnational public policy method and the foreign mandatory rules method. It was first asserted that the existence of a transnational public policy method as such is not questioned, but that the extent to which it should be used in uncertain. This study then proceeded to propose a solution on the interpretation of transnational public policies based on a test of *application-worthiness*: a balancing of interests behind the sanction on the one hand, and the interests of the parties and their contractual autonomy on the other hand. This happened by considering the apparent legitimacy of the sanction, the wideness of its applicability as well as the consequences of its application or non-application. It was concluded that at the very least multilateral sanctions may be applied as transnational public

policy. Also other sanctions may in given rare situations be affected by transnational public policy considerations.

Before dealing with the questions of *foreign mandatory rules*, it was discussed whether arbitrators should at all consider trade sanctions as choice of law issues, or rather only as issues of nullity or *force majeure* under the otherwise applicable law. It was argued that the method of indirect application, considering trade sanctions as mere facts under the otherwise applicable law would provide consistent outcomes and avoid the troublesome choice of law issues that would often arise with regard to trade sanctions, and should thus be preferred. Even if the *force majeure* method was noted to be the preferred method in most situations, it was also noted that the *foreign mandatory rules method* could prove useful in certain cases.

Issues of foreign mandatory rules were discussed in the final subchapters of this study. First, the public policies of the place of arbitration as well as those of potential places of arbitration were discussed. It was concluded that the arbitrator should indeed take note of these public policies and give them effect where they would probably risk rendering the award unenforceable or void. The mandatory rules of these or other places may also be given effect through the so-called *special connection test*: by considering the mandatory nature of the applicable provision of law, the closeness of its connection with the parties' dispute as well as the application-worthiness of that rule. The numerous uncertainties regarding the method however imply that it should be applied only where truly necessary.

5.2 Concluding remarks

Despite some historically notable sanctions regimes now gradually being dismantled, the big picture seems to indicate the growing global significance of trade sanctions. Even the sanctions regimes against Cuba and Iran, both bound to be overridden in the coming years, will still affect the trade with these states for years and further their reversal is subject to strict clawback provisions.[390] The newer sanction regimes are both broad and restrictive in their scope. Trade sanctions seem to have come to stay.

[390] The Economist, 25 July 2015.

Therefore, despite the fact that it is exceptionally difficult to grasp the contents and the very core of the issues and to present general solutions applicable in all situations, one should not give in before the broad uncertainties regarding the fundamental questions of jurisdiction and choice of law. Understanding these issues is essential for understanding how trade sanctions may have effect on the parties' relationship. The national judiciaries in enforcement and setting aside proceedings are in this sense in more fortunate position. They merely serve the purpose of protecting the notions of morality and justice as they are known in that certain country. Therefore, the notion of public policy may in most cases be used give effect to trade sanctions, without having to resort to complex assessment of the legitimacy of several laws and their merits. The court must only follow its own procedural law.

International arbitrator on the other hand should be independent of national public policies and follow the will of the parties. This may prove to be problematic since the general framework of choice of law within which the arbitrator works is far from clear and concise. Different schools of thought promote different solutions and none of them may be deemed completely correct or incorrect. This puts the arbitrator, just like the author attempting to present a more concise picture of the realm of international arbitration, in a difficult position. This study argued for relatively wide and unconditional contractual freedom for the parties to choose the law (and the trade sanctions therein) applicable to their dispute. It was argued that only when supranationally shared values are at stake should the arbitrator interfere with the parties' freedom and that otherwise the arbitrator should avoid resorting to unnecessary assessments of the legitimacy of trade sanctions in competing laws.

These reached conclusions are obviously based on contractual and autonomous notions of the nature of international arbitration.[391] Had one built one's argumentation on different premises, emphasizing more the sovereign right to impose laws within their competence and less the parties' autonomy, one could also have argued for a more jurisdictional solution whereby the interests protected by more numerous trade sanctions should be given effect by deeming them directly applicable in the parties' relationship. This other solution too, based on the foreign mandatory rules method and on a more jurisdictional view of international

[391] On the different notions of the fundamental nature of international arbitration, see chapter 1.3 above.

arbitration, can and has been quite convincingly argued.[392] As was already argued above, the intrinsic multiplicity of international arbitration and the unresolved questions regarding its essential nature make it possible to have a multiplicity of legitimate and well-founded solutions.

Be the chosen method for examining these issues whatever it may, the use of trade sanctions, multilateral or unilateral, is always an exceptional situation which requires a delicate balancing of interests and consideration of the unique facts of each case. Therefore, arbitrators as well as the national judges in enforcement or setting aside proceedings should make their best efforts reach an equitable outcome that balances the manifold interests and arguments in the best possible way. For the time being, not even a silver bullet *method*, let alone a *solution*, exists for exercising this discretion.

[392] See *i.a.* Azeredo da Silveira 2014, especially pp. 35–64.